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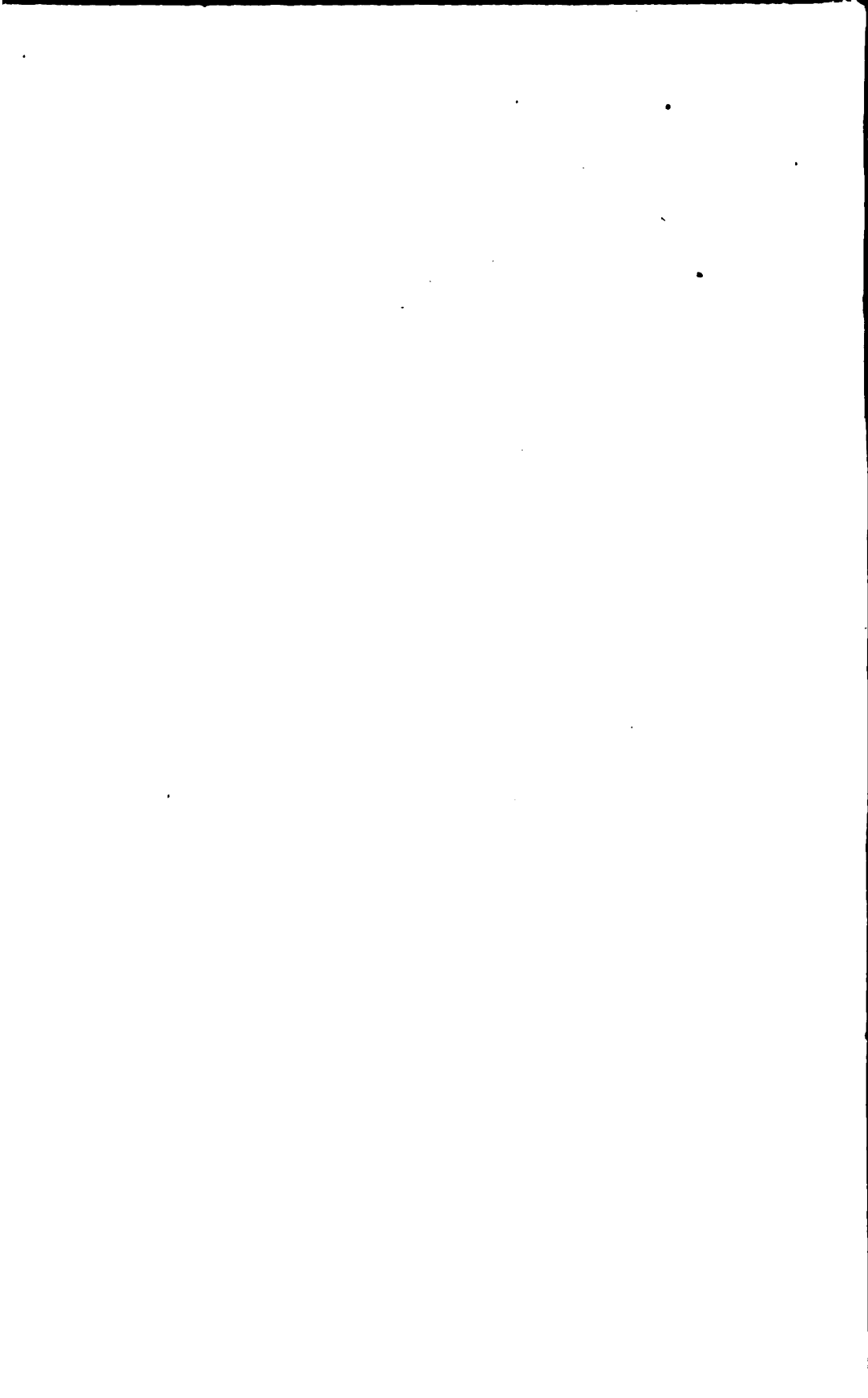
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# REPORTS OF CASES

HEARD AND DETERMINED BY

## THE LORD CHANCELLOR

AND THE

COURT OF APPEAL IN CHANCERY.

BY

J. P. DE GEX, S. MACNAGHTEN, AND A. GORDON, Esqs.,

BARRISTERS AT LAW.

EDITED,

WITH NOTES AND REFERENCES TO AMERICAN LAW,  
AND SUBSEQUENT ENGLISH DECISIONS,

BY

J. C. PERKINS.

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## MEMORANDA.

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IN the vacation after Michaelmas term, 1852, the Great Seal was, on the resignation of Lord St. Leonards, delivered to the Right Honorable Lord Cranworth, one of the Lords Justices: his Lordship was succeeded by the Right Honorable Sir George James Turner, one of the Vice-Chancellors.

Sir Alexander J. E. Cockburn and Sir W. Page Wood were also, at the same time, on the resignation of Sir F. Thesiger and Sir F. Kelly, reappointed to the offices of Attorney and Solicitor General.

In Hilary term, 1853, Sir W. Page Wood was appointed a Vice-Chancellor, in the room of Sir George James Turner; and Richard Bethell, Esq., was appointed Solicitor-General, and was afterwards knighted.





# A TABLE

## OF THE

### NAMES OF CASES REPORTED

#### IN THIS VOLUME.

[THE NUMERALS REFER TO THE MARGINAL PAGES.]

	Page
Ashley, Sewell v. . . . .	938
Attorney-General v. The Sheffield Gas Consumers' Company . .	304
Bailey, <i>Ex parte</i> , <i>In re</i> Barrell . . . . .	534
Baillie v. Jackson . . . . .	38
Baker, Mosley v. . . . .	1032
Baldwin v. Rogers . . . . .	649
Ball, <i>Ex parte</i> , <i>In re</i> Byrom . . . . .	155
Barlow, Church Building Society v. . . . .	120
Barrell, <i>In re</i> , <i>Ex parte</i> Bailey . . . . .	534
Bateman v. Cook . . . . .	89
Beard, Boulton v. . . . .	608
Benbow, Storrs v. . . . .	390
Berry, Roberts v. . . . .	284
Bewicke, Wilkinson v. . . . .	937
Bingham, Cookson v. . . . .	668
Birmingham, Wolverhampton, and Stour Valley Railway Com- pany, Inge v. . . . .	658
Boulton v. Beard . . . . .	608
Boyle, <i>Ex parte</i> , <i>In re</i> Boyle . . . . .	515
Boyse v. Rossborough . . . . .	817
Brodie, Grand Trunk Railway Company v. . . . .	146
Buchanan, Fleming v. . . . .	976

	Page
Bulmer, <i>In re, Ex parte</i> Johnson . . . . .	218
Burgess v. Burgess . . . . .	806
Byrom, <i>In re, Ex parte</i> Ball . . . . .	155
Campbell, <i>In re</i> . . . . .	585
Cartwright v. Cartwright . . . . .	982
Champion, Edwards v. . . . .	202
Church Building Society v. Barlow . . . . .	120
Collins, Eddleston v. . . . .	1
Collinson v. Collinson . . . . .	409
Cook, Bateman v. . . . .	39
Cookson v. Bingham . . . . .	668
Court, Thornton v. . . . .	293
Croly v. Weld . . . . .	993
Crosse v. General Reversionary and Investment Company . . . . .	698
Davies, Stone v. . . . .	240
Dawson v. Jay . . . . .	764
Derbishire v. Home . . . . .	80
Dover and Deal Railway, Cinque Ports, &c., Junction Company, <i>In re, Mowatt &amp; Elliott's Case</i> . . . . .	254
Ecclesiastical Commissioners, Temple v. . . . .	418
Eddleston v. Collins . . . . .	1
Edleston, <i>Ex parte, In re</i> Trinity College, Cambridge . . . . .	742
Edmond, <i>In re, Ex parte</i> Neilson . . . . .	556
Edwards v. Champion . . . . .	202
v. Tuck . . . . .	40
Fleming v. Buchanan . . . . .	976
v. Self . . . . .	997
Gann v. Gregory . . . . .	777
Gassiot, Ivison v. . . . .	958
General Reversionary and Investment Company, Crosse v. . . . .	698
Goldsmid, <i>Ex parte, In re</i> Rolle's Charity . . . . .	153
Gooch v. Gooch . . . . .	366

## TABLE OF CASES REPORTED.

ix

	Page
Grand Trunk Railway Company <i>v.</i> Brodie . . . . .	146
Great Northern Railway Company, South Yorkshire Railway and River Dun Company <i>v.</i> . . . .	576
Great Western Railway Company <i>v.</i> Oxford, Worcester, and Wolverhampton Railway Company . . . . .	841
Greenwood's Case, <i>In re</i> Sea Fire and Life Assurance Company	459
Gregory, Gann <i>v.</i> . . . .	777
Griffiths, <i>Ex parte</i> , <i>In re</i> Mostyn . . . . .	174

Hakewill, <i>Ex parte</i> . . . . .	116
Hargreaves, Powles <i>v.</i> . . . .	430
Haynes <i>v.</i> Haynes . . . . .	590
Heath <i>v.</i> Lewis . . . . .	954
<i>v.</i> Weston . . . . .	601
Heenan, King <i>v.</i> . . . .	890
Heward <i>v.</i> Wheatley . . . . .	628
Hicks <i>v.</i> Sallitt . . . . .	782
Hobson, Stansfield <i>v.</i> . . . .	620
Hodgson, <i>Ex parte</i> , <i>In re</i> Hodgson . . . . .	547
Home, Derbishire <i>v.</i> . . . .	80

Inge <i>v.</i> The Birmingham, Wolverhampton, and Stour Valley Railway Company . . . . .	658
Ivison <i>v.</i> Gassiot . . . . .	958

Jackson, Baillie <i>v.</i> . . . .	38
James, <i>Ex parte</i> , <i>In re</i> Tratt . . . . .	493
Jay, Dawson <i>v.</i> . . . .	764
Johnson, <i>Ex parte</i> , <i>In re</i> Bulmer . . . . .	218
Johnson <i>v.</i> Shrewsbury and Birmingham Railway Company . .	914
Jones <i>v.</i> Robinson . . . . .	910

Keene's Executors' Case, <i>In re</i> Vale of Neath and South Wales Brewery Company . . . . .	272
Kidd <i>v.</i> North . . . . .	947
King <i>v.</i> Heenan . . . . .	890
Kitson, Sale <i>v.</i> . . . .	119

	Page
Leake, <i>In re, Ex parte</i> Warrington . . . . .	159
Lewis, Heath v. . . . .	954
Lister, Tidd v. . . . .	857, 874
Lodge v. Prichard . . . . .	906
Manico, <i>Ex parte, In re</i> Manico . . . . .	502
Midland Union, &c., Railway Company, <i>In re</i> , Pearson's Executors' Case . . . . .	241
Milman, Morgan v. . . . .	24
Morgan v. Milman . . . . .	24
Mosley v. Baker . . . . .	1082
Mostyn, <i>In re, Ex parte</i> Griffiths . . . . .	174
Mostyn v. Mostyn . . . . .	140
Mowatt and Elliott's Case, <i>In re</i> Dover and Deal Railway, Cinque Ports, &c., Junction Company . . . . .	254
Neathway v. Reed . . . . .	18
Neilson, <i>Ex parte, In re</i> Edmond . . . . .	556
Norman's Trust, <i>In re</i> . . . . .	965
Northampton Charities, <i>In re</i> . . . . .	179
North, Kidd v. . . . .	947
Nowill, Rodgers v. . . . .	614
Oxford, Worcester, and Wolverhampton Railway Company, Great Western Railway Company v. . . . .	341
Peacock v. Stockford . . . . .	73
Pearson v. Rutter . . . . .	398
Pearson's Executors' Case, <i>In re</i> Midland Union, &c., Railway Company . . . . .	241
Pennell v. Roy . . . . .	126
Pinniger, Surcome v. . . . .	571
Powles v. Hargreaves . . . . .	430
Prichard, Lodge v. . . . .	906
Pugh, <i>In re</i> . . . . .	416
Records and Writs, Clerks of, <i>In re</i> . . . . .	723
Reed, Neathway v. . . . .	18

## TABLE OF CASES REPORTED.

xi

	Page
Ridgway v. Wharton . . . . .	677
Roberts v. Berry . . . . .	284
Robinson, Jones v. . . . .	910
Robinson's Charity, <i>In re</i> . . . . .	188
Rodgers v. Nowill . . . . .	614
Rogers, Baldwin v. . . . .	649
Rolle's Charity, <i>In re</i> , <i>Ex parte</i> Goldsmid . . . . .	153
Rossborough, Boyse v. . . . .	817
Roy, Pennell v. . . . .	126
Rutter, Pearson v. . . . .	398
Sale v. Kitson . . . . .	119
Sallitt, Hicks v. . . . .	782
Sea Fire and Life Assurance Company, <i>In re</i> , Greenwood's Case . . . . .	459
Self, Fleming v. . . . .	997
Sewell v. Ashley . . . . .	938
Sewell, <i>Ex parte</i> , <i>In re</i> Shaw . . . . .	508
Shaw, <i>In re</i> , <i>Ex parte</i> Sewell . . . . .	508
Sheffield Gas Consumers' Company, Attorney-General v. . . . .	304
Shrewsbury and Birmingham Railway Company, Johnson v. . . . .	914
Smith, Whitbread v. . . . .	727, 741
South Yorkshire Railway and River Dun Company v. Great Northern Railway Company . . . . .	576
Stansfield v. Hobson . . . . .	620
Stephenson, <i>Ex parte</i> . . . . .	969
Stockford, Peacock v. . . . .	73
Stone v. Davies . . . . .	240
Storrs v. Benbow . . . . .	390
Surcome v. Pinniger . . . . .	571
Taylor v. Taylor . . . . .	190
Temple v. The Ecclesiastical Commissioners . . . . .	418
Thornton v. Court . . . . .	293
Tidd v. Lister . . . . .	857, 874
Tratt, <i>In re</i> , <i>Ex parte</i> James . . . . .	498
Trinity College, Cambridge, <i>In re</i> , <i>Ex parte</i> Edleston . . . . .	742
Tuck, Edwards v. . . . .	40
Vale of Neath and South Wales Brewery Company, <i>In re</i> , Keene's Executors' Case . . . . .	272

	Page
Warrington, <i>Ex parte, In re</i> Leake . . . . .	159
Weld, Croly <i>v.</i> . . . .	998
West, <i>In re</i> . . . . .	198
Weston, Heath <i>v.</i> . . . .	601
Wharton, Ridgway <i>v.</i> . . . .	677
Wheatley, Heward <i>v.</i> . . . .	628
Whitbread <i>v.</i> Smith . . . . .	727, 741
Wilkinson <i>v.</i> Bewicke . . . . .	937
Worcester Corn Exchange Company, <i>In re</i> . . . . .	180

# INDEX OF CASES CITED.

[THE NUMERALS REFER TO THE PAGES AT THE TOP.]

A.		Page			Page
Abbott v. Bradstreet		23	Attorney-General v. Birmingham		304
Ackroyd v. Smithson	189, 191, 193,	194	v. Brewers' Co.		791
Adam, <i>Ex parte</i>		199	v. Cambridge		
Adams v. Jones		142	Consumers'		
v. London and Blackwall			Gas Co.		304
Railway Co.		662	v. Cleaver	307,	333
v. M'Millan		697	v. Davies		122
Agriculturist Cattle Ins. Co., <i>In re</i>			v. Doughty		315
	474, 476,	628	v. Eastlake		304
Aguilar v. Aguilar		860	v. Exeter, Corp.		
Albert Life Ass. Co., <i>In re</i>		459	of		303
Alderson v. Pope		180	v. Exeter, May-		
Aldred v. Constable		540	or of		788
Aldrich v. Cooper	857, 871,	882	v. Forbes	307,	309
Alexander v. Mackenzie	464,	465	v. Gee		304
Allan v. Allan		817	v. Hull		122
Allen v. Allen		207	v. Johnson	307,	
v. Cooper		288		309,	323
Alliance Bank, <i>Ex parte</i>		430	v. Leicester,		
Ambrose v. Clendon	174, 175,	176	Corp. of		230
Amphlett v. Parke		191	v. London and		
Andrews v. Partington		378	South-		
Angell v. Angell	822,	824	Western		
v. Hadden		878	Railw. Co.		
Annable v. Patch		23		315,	319
Anonymous Case		129	v. Lonsdale,		
Anson v. Lee	731,	733	Earl of		304
Archer v. Harrison		996	v. Lunatic Asy-		
Arkley, <i>Ex parte</i>	229, 230,	235	lum		304
Armitage v. Baldwin		230	v. Mid-Kent		
Armstrong v. Moran		398	Railw. Co.		
v. Storer		709	and South-		
Arnold v. Arnold		962	Eastern		
v. Buffum		398	Railw. Co.		304
v. Gilbert		197	v. Nichol	315,	318,
Ashburnham v. Ashburnham		599		319	
Ashby v. Palmer	193,	194	v. Parsons		122
Ashmore v. Evans		677	v. Sheffield Gas		
Aston v. Gwinnell		879	Consumers'		
v. Smallman		216	Co.		341
Atkinson v. Smith		727	v. U. K. Elec.		
			Tel. Co.		326





	Page
Bootle v. Blundell	818, 822, 834
v. Scarisbrick	944
Boraston's Case	401
Boughton v. Boughton	860, 878
v. James	898
Boulton v. Beard	651
Bourne, <i>Ex parte</i>	541
v. Buckton	51, 53, 59
Bowes v. East London Water-works	790, 804
Bowker v. Bull	860
Boyce v. McDonald	71
Boydell v. Drummond	685
Boyse v. Rossborough	817
Brace v. Marlborough, Duchess of	522
Bradford v. Foley	401
Bradley's Case	136
Bradley, <i>Ex parte</i>	129
v. Norton	613
Brickhouse v. Hunter	906
Bright v. Hutton	269
Bristol, Countess of v. Hungerford	191
Broad v. Broad	788
Broadbent v. Imperial Gas Co.	304, 318, 337
Brocklebank v. Johnson	612
Bromley v. Elliot	180, 476
v. Greathead	879, 885
v. Holland	788, 878
v. Wright	604
Brook, <i>Ex parte</i>	280, 238
Brooklyn White Lead Co. v. Ma-sury	618, 896
Brown, <i>Ex parte</i>	271, 442
v. Brown	597
v. De Tastet	908
v. Kempton	540
v. Lannan	817
v. Peck	990
Browne v. Like	879
v. Rose	879
Brownsword v. Edwards	290, 897, 898, 401, 403, 404, 406
Brudenell v. Elwes	378
Brumfield v. Palmer	284
Brunskill, <i>Ex parte</i>	230
Bryant, <i>Ex parte</i>	174
v. Withers	174
Bulkley v. Wilford	4
Bull v. Faulkner	523
v. Pritchard	612
Bumford, <i>Ex parte</i>	175
Bunch v. Hurst	23
Bunn's Case	556
Bard v. Burd	23
Burdet v. Hopegood	393
Burges v. Mawbey	740
Burgess v. Burgess	617

	Page
Burgoyne v. Showler	780
Burmester v. Norris	184
Burnell v. Brown	661
Burr v. Sim	189, 197
Burridge v. Row	230
Burt v. Sturt	40, 53
Bush v. Sheldon	817
Butcher v. Churchill	232
Butler and Baker's Case	209
Butler v. Bushnell	142, 651
v. Lowe	378, 390
Butterfield v. Hawkins	398
Buxton v. James	304, 358
Byrd v. Odem	571

C.

Caldwell v. Ernest	145
Camoy's v. Blundell	142
Camoy's, Lord v. Blundell	945
Campbell v. Ingilby	571
v. Leach	31
Cardigan's, Lord, Case	910
Carew's Case	254
Carpenter v. Heard	398
Carr v. Burdiss	540, 541
Carrick's Case	246, 260
Carrick, <i>Ex parte</i>	430
Carron Company v. Maclaren	126
Carter, <i>Ex parte</i>	198
v. Bentall	20
Carver v. Burgess	18, 21
Catlin v. Valentine	304
Caton v. Caton	571, 697
Cator v. Butler	820
Cattlin v. Brown	390
Chambers v. Payne	23
Chapman v. Brown	122
Chartered Gas Company v. Cen-tral Gas Company	317
Chase v. Goble	540
Cheever v. Perley	619
Chelow's Trust, <i>Re</i>	40
Chew's Case	23
Child v. Elsworth	780
Childs v. Russell	23
Chippendale, <i>Ex parte</i>	180
Cholmondeley v. Clinton	788
Chorley Water-works Case	340
Christian v. Foster	191
Christy, <i>Ex parte</i>	175
v. Courtenay	408, 409
Church v. Mundy	605
City Bank v. Luckie	430
Clack v. Sainsbury	164, 170
Clark v. Burgh	3, 731
v. Clark	896

	Page		Page
Clark v. Fry	339	Crowder v. Tinkler	307, 833
v. Wallace	23	Crump v. Lambert	304
Clarke v. Clarke	393	Cruse v. Barley	194
v. Yonge	790, 808	Cumming v. Bailey	540
Cleeve v. Mahony	326	Cutbill v. Kingdom	1009, 1029
Clement v. Maddick	618		
Clifton's Case	254		
Clinan v. Cooke	693		
Coates v. Hart	398	D.	
v. Holbrook	896		
v. Pearson	16	Dabney v. Stidger	180
Cocksedge v. Cocksedge	987	Darby v. Darby	72
Coe v. Lake Co.	313	Darling v. March	180
Cogan v. Stephens	191, 197	Daubeny v. Cockburn	979
Colclough v. Boyse	817	Davidson v. Isham	304
Coleman, Ex parte	502	Davies, Re	72
Coles v. Sims	358	v. Thorns	21
Collins v. Collins	24	Davis v. Norton	400
v. Wakeman	191, 194, 195	Dawe v. Holdsworth	174, 175, 176
Collins Co. v. Brown	896	Day v. Luhke	284
Colton v. Wilson	820, 830, 833, 834	Dean v. Dean	677
Combe v. Hughes	40	De Bernales v. Fuller	442
Commonwealth v. Passmore	339	Deffis v. Goldschmidt	390
Compton v. Bedford	546	Dehon v. Foster	125, 126, 140
v. Bloxham	780	Delmare v. Rebello	142
Conly v. Kincaid	23	Den v. English	398
Connop v. Meaks	166	v. Mugway	398
Contract Corporation, In re	459	v. Taylor	398
Cook v. Cook	212, 213, 216	Denn v. Dolman	877
v. Rogers	540	Dent v. Pepys	142
Cooke v. Forbes	304	Denton v. Stewart	296
Cooper v. Bockett	778, 780	Devonsher v. Newenham	818, 822,
Cooth v. Jackson	689		829, 850, 852, 853
Copis v. Middleton	230, 860	Devoy v. Devoy	409
Cork and Bandon Railway Co. v.		Dickson, Ex parte	956
Goode	628	Digby v. Legard	191, 194
Corley v. Stafford, Lord	964	Dixon v. Birch	879, 885
Cornfield v. Wyndham	604	v. Yates	564
Cornwall, In re	857	Dobell v. Hutchinson	696
Cotton v. Ward	284	Doe v. Bell	944
Court v. Jeffery	935	v. Bingham	879
Courtois v. Vincent	597	v. Davidson	788, 795, 796
Cousins v. Schroder	611	v. Fricker	674
Coventry v. Lauderdale	964, 966	v. Hallett	393
Cozine v. Graham	677	v. Haslewood	944
Crafton v. Frith	122	v. Huthwaite	142
Craig v. Leslie	189, 197	v. Jessep	397, 403, 404
Crawhall's Trusts, In re	18, 21	v. Joinville	77
Cray v. Willis	216	v. King	165
Creed v. Creed	599	v. Martin	791
Cripps v. Wolcott	20	v. Needs	142
Crisp v. Bunbury	1009	v. Prigg	671
Crittenden v. Drury	284	v. Rawding	966
Croft v. Day	616, 902	v. Stephens	879
Croly v. Weld	599	v. Williams	788
Cropper's Case	180	Doe d. Usher v. Jessep	400
Crosbie v. Hurley	1	Watson v. Shippard	400
Crossfield's Case	271, 276, 642	Doo v. Brabant	401

	Page		Page
Dormer v. Fortescue	802, 803, 810, 812, 814, 815	Ellis v. Sheffield Gas Consumers' Co.	337
Dorville v. Wolff	21	Elmhirst v. Spencer	307
Dow v. Sayward	180	Elton v. Elton	909
Dowell v. Dew	81	Ely, Dean of v. Bliss	791
Downing College Case	209	Emerson v. Badger	618, 896
Drake v. Mitchell	174	v. Cutler	23
Drakeford v. Drakeford	18	England v. Curling	278
Drakeley's Trust, <i>Re</i>	40	English and American Bank, <i>Ex parte</i>	430
Drewett v. Pollard	40	Ensign v. Wands	180
Drummond v. St. Albans, Duke of	782, 788, 790, 791, 802, 803, 810, 811, 814, 815	Erish v. Rives	4
Dryden v. Frost	296	Ernest v. Nicholls	474
Duffy's Trusts, <i>Re</i>	857	Essex v. Clement	18
Dunboyne, Lord v. Brander	599	Ettricke v. Ettricke	671
Dundas v. Dutens	571	Evans v. Bicknell	96
Dungannon, Lord v. Smith	378, 393	v. Evans	18
Dunkley v. Dunkley	859	v. Hellier	51, 52, 63
Dunn v. Calcraft	879	Ewart v. Williams	904
Durant v. Titley	987	Ewing v. Crouse	284
Durour v. Motteux	191, 194	Eyles v. Ward	587
Dursley, Lord v. Fitzhardinge Berkeley	817	Eyre v. Marsden	51, 52, 53, 65, 71
Dutton v. Morrison	540	v. Shaftsbury, Countess of	764
Dyer v. Dyer	408, 414		
Dykes's Estate, <i>In re</i>	24		
		F.	
E.		Falkner v. Grace	860
Eaden v. Firth	326	Farina v. Silverlock	617, 896
Earle v. Browne	877, 882, 886	Farmer v. Giles	996
Early v. Benbow	392, 393	v. Smith	996
v. Middleton	392, 393	Farwell v. Mather	697
Eastman v. Company	326	Fauconberge v. Fitzgerald	733
Eaton v. Barker	21	Faversham, Mayor, &c. of v. Ryder	120
Eavestaff v. Austin	599	Fay v. Sylvester	23
Eddleston v. Collins	731	Fayette Mutual Fire Ins. Co. v. Fuller	459
Edelsten v. Edelsten	896	Feigley v. Sponerberger	476
Edgerton v. Peckham	284	Fenny v. Ewestace	966
Edwards v. Champion	212	Fenwick v. Greenwell	96
v. Gibbs	23	Ferlotti v. Lumley	722
v. Hull	120	Fernie v. Young	628
v. Jones	571	Festing v. Allen	613
v. M'Leay	296	Finch v. Finch	409
v. Morgan	790, 806, 808, 810, 812, 814, 815	Fingal, Lord v. Blake	818, 822, 850, 852, 853
v. Tuck	385	Finley v. Lynch	284
Egerton v. Brownlow, Lord	987	Fish v. Dodge	304
Elborne v. Goode	53	Fitch v. Cotheal	736
Eldridge v. Eldridge	23	v. Stumps	180
Elibank, Lady v. Montolieu	857, 859	v. Weber	191, 197
Elliott v. Cordell	859, 866	Fitzmaurice v. Bayley	697
v. Elliott	378, 409	Fitzroy v. Howard	208
Ellis v. Bartrum	857	Flack v. Downing College, The Master, Fellows, and Scholars of	9, 209, 211
v. Maxwell	53, 65	Flagg v. Mann	677
v. Nimmo	571	Fleet, <i>Ex parte</i>	540

	Page		Page
Fletcher's Case	216	Goldie v. Gunston	199
Fletcher v. Pollard	906	Goldsmid v. Stonehewer	119
Flint v. Brandon	661		
v. Warren	191, 197	v. Tunbridge Wells Im-	
Fludyer v. Montague	837, 845	provement Commis-	
Foligno v. Martin	684	sioners	822
Follett v. Moore	165	Gooch v. Gooch	394
Fonnereau v. Poyntz	599	v. Tippell	385
Forbes v. Marshall	476	Goodere v. Lloyd	935
Ford v. Ruxton	597	Goodright v. Hodges	414
v. Stuart	734	Gordon v. Atkinson	191, 197
Forder v. Wade	812	v. Cheltenham Railw. Co.	359
Forsyth v. Rathbone	23	v. Sea Fire Life Assur-	
Fortune v. Buck	817	ance Society	476
Foster v. Smith	598, 994	Gorton v. Champneys	878
Foulds v. Midgley	818	Gourlay v. Somerset, Duke of	30, 34
Fowle v. Freeman	684	Gouthwaite's Case	641, 644
Fowler v. Reynal	96	Gouthwaite, <i>Ex parte</i>	276
Fox, <i>In re</i>	857	Gowen v. Klous	697
Fox's Will, <i>Re</i>	18	Grafton, Duke of v. Hilliard	307
Foxley, <i>Ex parte</i>	584	Graham v. Birkenhead, Lancashire,	
France v. France	571	and Cheshire Junc-	
Francis v. Grover	778	tion Railway Co.	341
Frank v. Frank	878	v. Chapman	540
Franks v. Weaver	896	v. Maxwell	125, 126, 131,
Fraser, Trenholm, & Co., <i>In</i>			137
<i>re</i>	430	v. Van Diemen's Land Co.	556
Freeman v. Tottenham and Hamp-		Grant v. Ellis	790, 791, 815
stead Railway Co.	326	v. Grant	140
Freemantle v. Banks	52	Grave v. Cadwell	180
Freeport v. Bartol	697	Graves v. Shattuck	340
French v. Baron	820	Gray v. Garman	652
Fuller, <i>Ex parte</i>	817	Grayson v. Atkinson	821, 822
v. Melrose	304, 359	Great Western Railway Co. v. Ox-	
Fulton v. Fulton	18	ford, Worcester, and Wolver-	
Furnivall v. Coombes	462	hampton Railway Co.	307
Fussell v. Daniel	158	Great Western Railway Co. v.	
Fyler v. Fyler	230, 628	Rushout	854
		Greedy v. Lavender	859
		Green v. Dunn	140
		v. Gascoyne	40
		v. Howell	23
		v. Jackson	194
		Greenaway v. Adams	296
		Greenwood's Case	180
		Greenwood, <i>Ex parte</i>	230
		v. Roberts	378, 390
		v. Taylor	642
		Gregory v. Mighell	31, 36
		Gregson's Trust Estate, <i>Re</i>	17
		Greville v. Tyles	780
		Grey v. Grey	408
		v. Pearson	397, 398
		Griffiths v. Vere	53, 64
		Grove v. Bastard	820, 822, 836, 845
		v. Young	820, 836, 845
		Gude v. Mumford	597
		Gundry v. Finniger	611, 651
		Gurdon v. Tomlinson	822

INDEX OF CASES CITED.

xix

	Page		Page
H.		Hibblewhite v. M'Morine	563
Habergham v. Vincent	788	Higgins, <i>Ex parte</i>	173
Haigh, <i>Ex parte</i>	571	Higginson v. Clowes	661
Haines v. Taylor	307, 315	Hill v. Millburn	288
Halcomb v. Lake	398	v. Tollit	725
Halford v. Stains	51, 52, 61	Hind v. Selby	21
Halifax v. Wilson	613	Hipkin v. Wilson	727, 731, 738
Halkett v. Merchant Traders' Ship		Hobhouse, <i>Ex parte</i>	439
Loan and Ins. Association	469	Hocker v. Gentry	23
Hall v. Robertson	966	Hodgson v. Powis, Earl of	315
Hallett v. Dowdall	184, 187, 462, 465, 469, 482	Hodle v. Healey	625
Hambro v. Hull and London Fire		Hoffman v. Cooke	877
Ins. Co.	474	Hoggart v. Scott	284
Hamer's Devises' Case	271	Hollingworth, <i>Ex parte</i>	551
Hammersley v. De Biel	520, 573, 574	Holloway v. Holloway	896
Hammond, <i>Ex parte</i>	502	v. Webber	366
v. Foster	878	Holmes v. Coghill	978, 979
Hanman v. Riley	119	v. Cradock	400
Harcourt, <i>Ex parte</i>	520	v. Holmes	398
Harnett v. Yeilding	661	Holthouse, <i>Ex parte</i>	501
Harris v. De Tastet	587	Re	503
v. Ingledew	818	Hood v. Burlton	877
Harrison, <i>In re</i>	430	Hooper v. Smith	546
v. Bowe	398	Hope v. Carnegie	126
Hart v. Tribe	764	v. Hope	764
v. Tulk	943	Horton v. Whittaker	401
Hassell v. Merchant Traders' Ship		Hoste v. Blackman	944
Loan and Ins. Association	469	v. Pratt	378
Hassells v. Simpson	540	Hotham v. Sutton	964
Hastings v. Hopkinson	180	Houghton, <i>In re</i>	490
Havard, <i>Ex parte</i>	229, 230, 235	Hovenden v. Annesley, Lord	96
Haver v. Shitz	898	Howard v. Braithwaite	684
Havergal v. Harrison	780	v. Collins	18
Hawkes v. Eastern Counties Rail-		v. Howard	18
way Co.	575, 661	v. Wood	8
Hawkins v. Everett	23	Huffman v. Hubbard	21
v. Hamerton	72	Hughes v. Hughes	378
Hawley v. Bradford	736	v. Williams	857
Haws v. Haws	672	Hull Glass Company's Case	480
Hawthorn v. Shedden	976	Humble v. Mitchell	564
Hay v. Willoughby	641	Humphreys v. Jenkinson	878
Haydon v. Williams	625	Hunt v. Hunt	398
Hayward v. Harmon	180	Hunter's Case	260, 465
Hazen v. Durling	126	Hunter, <i>Ex parte</i>	229, 230, 235
Hearle v. Greenbank	4, 96	Huntingdon, Earl of v. Hunting-	
Heartt v. Corning	906, 909	don, Countess-Dowager of	727, 736
Heather v. O'Neil	727, 738	Hurlburt v. Emerson	18
Helsham v. Langley	662	Hurley v. Brown	697
Henderson, <i>Ex parte</i>	199	Hutcheson v. Smith	909
v. Gilchrist	628	Hutchinson v. Stevens	611
Henniker v. Wigg	232	Hutton v. Cruttwell	540
Hepburn v. Auld	284	v. Upfill	250
Hepworth v. Heslop	709		
Heron v. Stokes	994	I.	
Hervey v. McLaughlin	652	Ile's Case	8
Heaketh v. Magennis	18	Imbert, <i>Ex parte</i>	490

	Page		Page
Inchbald v. Barrington	304, 326,	Kingsbridge Flour Mill Company	
v. Robinson	333	v. Plymouth Grinding and Bak-	
Innes v. Mitchell	598	ing Company	459, 466, 480
International Life Assurance So-		Kinnoul, Earl of v. Money	860
ciety, <i>In re</i>	180	Kluht's Case	272
Irby v. Vining	180	Knight v. Barber	564
Irnham v. Child	879	v. Whitehead	736
		Knott v. Morgan	903

## J.

Jackson v. Blanshan	398
v. Hobhouse	96
v. Innes 3, 15, 731, 733,	736
v. Oglander	677
Jacobs v. Amyatt	987
James v. Rice	158
v. Wyndford, Lord	390
Janney v. Sprigg	398
Jeans v. Cook	408
Jee v. Audley	378
Jefferys v. Jefferys	571
Jenkins v. Gower	656
Jenney v. Andrews	978
Jessopp v. Watson	191
Jewson v. Moulson	858
Johns v. Reardon	736
Johnson v. Fesemeyer	534
Joint-stock Discount Co., <i>In re</i>	430
Jones v. Geddes	131, 136
v. Harris	878
v. Jones	820
v. Kearney	96
v. Maggs	51, 53
v. Robbins	284
v. Sisson	459
v. Smith	96
v. Tucker	944
Jortin v. South-Eastern Railw. Co.	619

## K.

Keep's Will, <i>In re</i>	18, 20
Keller v. Fisher	284
Kelso v. Dickey	398
Kenebel v. Scrafton	709
Kennedy v. Cassillis, Earl of	129
Kensington v. Bouverie	741
Kerr v. Middlesex Hospital	994
King v. Hoare	175
King, The v. Bridgewater, Mayor,	
&c., of	424
King, The v. Kingscleere Church-	
wardens of	3
King, The v. Oundle, The Lord	
of the Manor of	209, 211

## L.

Lancashire v. Lancashire	393
Lancaster v. Evors	727, 736
Lane v. Horlock	158
v. Pannell	798
Langton v. Haynes	158
Lansing v. M'Killup	180
Lassence v. Tierney	571, 573, 574
Latham, <i>In re</i>	430
Laughton v. Atkins	817
Laycock v. Johnson	439, 442
Leake v. Robinson	378, 393, 397
Leather Cloth Co. v. Lorisont	896
Leavitt v. Peck	476
Lee v. Haley	896
v. Park	126
Leeming v. Sherratt	20, 612
Lennon v. Napper	287, 290
Le Roy v. Johnson	476
Lethieullier v. Tracy	400, 401, 405
Lewin v. Cox	671
v. Dodd	671
Lewis v. Campbell	296
v. Langdon	903
v. Lewis	817
v. Nangle	822, 834
Lidgard v. Garland	935
Lill v. Lill	18
Lindon v. Sharp	541, 544
Lindsay v. Pleasants	189
Liverpool Marine Credit Co. v.	
Hunter	125
Livingston v. Roosevelt	180
Lloyd v. Collett	284
v. Lloyd	612, 954
v. Read	408
Lockey v. Lockey	817
Loder's Case	430
Lomas v. Wright	378
Londesborough's Case	254
London and Eastern Banking Cor-	
poration, <i>In re</i>	174
Longdon v. Simson	53
Longstaff v. Rennison	122
Lowe, <i>Ex parte</i>	520
Lucas v. Nockells	540
Lugar v. Harman	77

# INDEX OF CASES CITED.

xxi

	Page
Lumley v. Wagner	922, 927, 931
Lush's Trusts, <i>In re</i>	112
Luxford v. Cheeke	207, 401

## M.

Maberley v. Strobe	966
Macaulay v. Philips	859
M'Dermott v. Kealy	378
M'Donald v. Bryce	53, 65
McGoodwin v. Stephenson	293
M'Graw v. Pulling	278
Mackrell v. Hunt	820, 821, 822, 824, 837, 845, 850
Maclaren v. Stainton	126, 131
McMurray v. Spicer	284, 697
M'Neill v. Cahill	497
Macrae v. Smith	126
Mainwaring v. Beevor	378
Malcolm v. Malcolm	398
Malins v. Freeman	662
Mallabar v. Mallabar	191, 194
Mann v. Thompson	390
Manning v. Purcell	780
Manser v. Back	662
Marco v. Low	140
Markwell's Case	260
Marples v. Bainbridge	954
Marriage v. Marriage	879
Marriott v. Kirkham	117
v. Turner	189
Marris v. Burton	597
Marshal, <i>Ex parte</i>	230
Marson v. Lund	462
Martin v. Martin	126
Martyn, <i>Ex parte</i>	503, 547, 553, 555
Mason v. Bogg	166, 642
v. Mason	398
v. Sanborn	326
Mather v. Scott	122
Mathews v. Keble	40
Matterson v. Elderfield	996
Matthews, <i>Ex parte</i>	230
Maugham v. Vincent	964, 966
Maxwell v. Hogg	896
Mayo v. Swope	284
Medlicott's Case	175
Mence v. Mence	778
Meredith v. Heneage	671
Merrimack Manuf. Co. v. Garner	617, 896
Merryweather v. Jones	981
Middleton v. Losh	40, 49, 51, 53
v. Messenger	652
Millar v. Turner	393
Miller v. Eaton	651
v. Huddleston	589, 690

Miller v. Post	565
Millington v. Fox	903
Milnes v. Gery	34
Milsome v. Long	780
Miner v. Baldwin	590
Miser v. Trovinger	180
Mitchell, <i>Ex parte</i>	511
v. Colls	964
Moet v. Couston	896
Mogg v. Baker	540
v. Mogg	378
Monck v. Monck, Lord	52
Money v. Jordan	520
Monroe v. Conner	476, 480
Moody v. Walters	400
Moore v. Lyons	18
Morehouse v. Newton	909
Moreland v. Lemasters	571
Morgan v. Brundrett	540
v. Higgins	904
v. Morgan	51, 53, 619, 815
v. Scott	284
Morgan's Case	275, 276
Morley v. Rennoldson	954
Morrell v. Frith	625
Morrison v. Arnold	820
v. Glover	1009
Morrow v. Brenizer	197
Morse v. Merest	31
Mortimer v. Hartley	398
Morton v. Dean	697
Mosseley v. Motteux	788
Mosley v. Baker	1011, 1027, 1030
Moule, <i>Ex parte</i>	199
Mowatt v. Londesborough	254, 266
Mudie, <i>Ex parte</i>	174
Murdock v. Anderson	697
Murless v. Franklin	408, 414
Musters v. Wright	935

## N.

Nagle's Appeal	189
Nanfan v. Legh	393
Nannock v. Horton	604
Napier v. Napier	944
Napper v. Sanders	400
Nash v. Cutler	28
Naylor v. Robson	18
Neathway v. Reed	607
Ness v. Angas	642, 647
v. Armstrong	642, 647
Nettleton v. Stephenson	40
Newbolt v. Pryce	142
Newburgh, Lord v. Bickerstaff	815
Newis v. Lark	987
Newton v. Swasey	677



	Page		Page
New York Fire Ins. Co. v. Bennett	180	Peak v. North Staffordshire Rail- way Company	697
New Zealand Banking Corp., <i>In re</i>	430	Pemberton v. Pemberton	890
New Zealand Banking Corp., <i>Levi</i> & Co.'s Case	430	Pendleton v. Rooth	619
Nichols v. Denny	23	Penny v. Allen	782
v. Johnson	697	v. Pickwick	556
Nicholson, <i>Ex parte</i>	502	Perkins v. Baynton	672
<i>In re</i>	502	Perrin, <i>Ex parte</i>	524
Nield v. Smith	879	<i>Re</i>	515, 523, 526, 528
Niemcewicz v. Ghan	736	Perry v. Rhodes	23
Nightingale's Charity, <i>Re</i>	154	v. Truefitt	909
Nixon v. Phillips	164, 166, 170	Peters v. Anderson	175
Norbury's Case	246	Pettward v. Prescott	802, 803, 807, 812, 814
Norris v. Winsor	288	Philipps v. Chamberlaine	780
North v. Valk	189	Phillips v. Clagett	298
Norwich v. Norfolk Railway Co.	575	v. Phillips	189, 191, 194, 195, 197
Nurse, <i>In re</i>	534	Philpott v. St. George's Hospital	120
		Philps v. Evans	651, 652
O.		Phipps, <i>Ex parte</i>	199
O'Brien v. Currie	199	v. Ackers	401, 612
Ogden v. Stone	540	v. Williams	612
Ogilvie v. Foljambe	662, 684	Pickering v. Ely, Bishop of	930
Old Colony Railroad Corp. v.		Pickett v. Loggon	790, 804, 812
Evans	657	Pierson v. Stienmyer	180
Oldham v. Pickering	208	Pike v. Stephenson	23
Olney v. Hull	18	Pillow v. Thompson	304
Ontario Bank v. Root	677	Pinckney v. Hagerdon	284
Oppenheim v. Henry	780	Plowden v. Hyde	3, 731, 738
Osgood v. Breed	817	Pope v. Whitcombe	957, 961, 962, 964
Owen v. Thomas	684, 697	Poplin v. Hawke	817
Oxford and Cambridge, The Uni- versities of v. Richardson	326	Portarlington, Lord v. Graham	296
		Porter v. Fox	398
P.		v. Walker	540, 544
Packham v. Gregory	611	Portington's Case	987
Page, <i>Ex parte</i>	116	Potter v. Webb	817
v. Page	115	Powell v. Waters	180
Parker v. Keck	4	Powys v. Mansfield	55
v. Marchant	962	Pratt v. Carroll	284
v. Parker	398, 817	v. Mathew	964
Parkhurst v. Van Cortland	571	v. Taliaferro	189
Parkin v. Thorold	287	Preece and Evans's Case	461
Parr, <i>Ex parte</i>	442	Prescott v. Hadow	462
Partridge v. Menck	896	Price, <i>Ex parte</i>	879
Pascoe v. Swan	802	v. Moulton	174
Patten v. Tallman	817	Prichard's Case	458
Payne, <i>Ex parte</i>	1009	Priddy v. Rose	230
Peabody v. Flint	304	Prideaux v. Webber	199
Pearce v. Pearce	80	Pritchard v. Arbouin	122
Pearsall v. Simpson	401	Professional Life Ass. Co., <i>In re</i>	459
Pease v. Hirst	232	Pryor v. Hill	858
Peck v. Elder	304	Pulteney v. Warren	790, 812
		Purse v. Snaplin	599
		Putnam v. Gleason	23
		Pye, <i>Ex parte</i>	52
		Pym v. Lockyer	52

	Page		Page
Q.		Rosher v. Hurdie	877
Queen's College Case	755, 759, 760, 768	Ross v. Butler	304
Queen, The v. Carmarthen, Mayor &c. of	424	v. Drake	28
Queen, The v. Joint-stock Companies, The Registrar of	564	Rowe v. Power	211
Queen, The v. Norwich, Mayor, &c. of	424	Rowell v. Walley	738
Quicke v. Leach	408	Royal British Bank v. Turquand	458
		Ruscombe v. Hare	731, 733, 741
		Rushton v. Troughton	587
		Russell v. Russell	571
		Ryall v. Hannam	142
		Ryder v. Bickerton	96
R. ,		S.	
Randall v. Morgan	571	Sadler v. Pratt	378
Ranclaugh v. Hayes	295	Sainsbury v. Jones	296
Rawson, <i>Ex parte</i>	230	St. Helen's Smelting Company v. Tipping	304
Ray v. Enslin	398	St. John v. St. John	986, 987
Redington v. Redington	409	Salisbury v. Petty	652
Reed v. Jones	906	Marquis of v. Great Northern Railway Co.	662
Reeve v. Hicks	733, 738	Salmon v. Salmon	366
Regina v. Knight	337	Sammon, <i>Ex parte</i>	230
v. Longton Gas Co.	337, 339	Samuel v. Duke	540
v. Trafford	996	Sanders v. Kiddell	597
Remington v. Irwin	284	Saunderson v. Jackson	31
Rennington v. Cole	209	Savage v. Foster	96
Rex v. Russell	315	Sayward v. Sayward	398
v. Tindall	315	Scamler's Case	1
v. Ward	307	Scamler v. Waters	1, 7
Reynell v. Sprye	497	Scawin v. Scawin	409
Rhodes v. Dunbar	304	Schroder v. Schroder	802
Rich v. Cockell	935	Scolastica's Case	987
Richards v. Chambers	859	Scott v. Avery	24
Richardson v. Smith	24, 34, 35	v. Liverpool, Corporation of	24
Richmond v. Gray	284	v. Porcher	684
Ricketts v. Bennett	184	v. Spashett	857, 859
Ridgway v. Wharton	697	v. Tyler	954
Ridley v. Plymouth Grinding and Baking Company	459, 465, 466, 479	Seagrave v. Pope	1003, 1009, 1011, 1012
Ringrose v. Bramham	393	Seaman v. Wood	366, 390
Ripley v. Waterworth	208	Secombe v. Edwards	398
Ripon v. Hobart	326	Seifferth v. Badham	656
Rishton v. Cobb	954	Seixo v. Provezende	617, 896
Robert's Case	260	Senior v. Pawson	304
Roberts v. Madocks	878	Seton v. Slade	284, 288
Robertson v. Johnston	398	Sewell v. Denny	40
v. Liddell	540	Seymour v. Delancy	284
Robinson v. Gee	860	Shales v. Shales	409
v. Hardcastle	378	Shallcross v. Palmer	780
v. London Hospital	189	v. Wright	189, 191, 197
v. Taylor	191, 194	Sharp v. Sharp	18
Robinson's Executors' Case	476	Sharp and James's Case	241
Rochdale Canal Company v. King	309	Shattuck v. Stedman	23
Rodgers v. Nowill	896	Shaw, <i>Ex parte</i>	878
Rodney v. Chambers	987	v. Rhodes	51, 52
Boe v. Aistrop	791		
v. York, Archbishop of	880		
Rose v. Calland	284		

	Page		Page
Shaw v. Wilkins	288	Stiffe v. Everitt	859, 873
Shea v. Berchetti	780	Stitzell v. Kopp	288
v. Boschetti	778	Stoddart v. Tuck	571
Sheffield v. Buckinghamshire, Duchess of	822	Stone v. Commercial Railway Co.	662
Sheffield v. Coventry, Earl of	408	Storrs v. Benbow	378, 390, 393
Shipman v. Henbest	756	Stott v. Price	23
Shipperdson v. Tower	604	Stoughton v. Lynch	909
Shrewsbury and Birmingham Rail- way Co. v. London and North- Western Railway Co.	575	Straffon's Executors' Case	641, 647
Shrimpton v. Laight	896	Strickland v. Strickland	824, 838, 845, 850, 853
Shuffleton v. Jenkins	288	Stringer v. Gardiner	140
Sibley v. Perry	604	Stuart v. Cockerell	649
Sidmouth v. Sidmouth	408, 409, 414	Sturgis v. Champneys	859
Siebert v. Spooner	540	Sutton v. Tatham	564
Simmonds v. Rudall	780	Sykes v. Sykes	900
Simpson, <i>Ex parte</i>	540		
v. Howden, Lord	129, 824	T.	
Sims v. Helling	19	Talbot v. Radnor, Earl of	820
v. Smith	23	Talbot's, Lord, Case	461, 465, 482
Simson v. Ingham	232	Tanner's Case	246, 641
Singleton v. Gilbert	378	Tasburgh's Case	3
Skeats v. Skeats	409	Tash v. Adams	304, 341, 359
Skinner v. M'Donnall	677, 684	Tatham v. Wright	820, 822
Skrymsher v. Northcote	53	Tatum v. Catomore	780
Slade v. Pattison	207, 218	Taylor, <i>Ex parte</i>	430
Sleight v. Lawson	904	Taylor, <i>Ex parte</i>	534
Small v. Small	817	v. Beech	574
Smith v. Cannan	540	v. Beverley	20
v. Chandos	909	v. Carpenter	618, 896
v. Compton	296	v. Longworth	284
v. Hull Glass Company	459, 466, 466, 468, 469, 480	v. Richardson	780
v. Lomas	40	Taylor's Settlement	191
v. Pilkington	996	Tench v. Cheese	857
v. Wigley	230	Thomas v. Stevens	140
Snowden v. Noah	896	Thompson, <i>Re</i>	780
Solomon v. Solomon	278	v. Brown	126
Soltau v. De Held	304	v. Thompson	18
Soper, <i>Ex parte</i>	230	v. Todd	677
Southern v. How	902	v. Universal Salvage Co.	461
South Wales Railway Co. v. Wythes	24	Thornton v. Henry	677
South Yorkshire Railway Co. v. Great Northern Railway Co.	575	v. Illingworth	199
Soutten v. Soutten	230	Thwaites v. Foreman	597
Sparrow, <i>Ex parte</i>	540	Thynne v. Glengall, Lord	685
v. Farmer	996	Tidd v. Lister	874, 880
Spottiswoode v. Stockdale	540	Tiernan v. Roland	284
Sprackling v. Ranier	378, 393	Tilley v. Thomas	284, 291
Spurgeon v. Collier	571	Todd v. Gee	296
Squire v. Campbell	879	Tombs v. Roch	522
Stanger v. Wilkins	534	Tompkins v. Tompkins	817
Stanton v. Hall	859, 866	Topliff v. Jackson	906
Stephens, <i>Ex parte</i>	430	Town v. Hendee	180
Stert v. Platel	651	Townsend v. Ash	812
Stewart v. Moody	540	Townshend, Lord v. Windham	978
		Marquis v. Stangroom	661
		Trelawny v. Winchester, Bishop of	424
		Trent v. Hanning	943

## XXV

C

	Page		Page
Wilson v. Wilson	390, 986	Wroughton v. Colquhoun	598, 994
Wiswall v. McGown	288	Wryghte's Case	250
Womrath v. McCormick	23	Wynn v. Morgan	284
Wood v. Cone	189	Wynstanley v. Lee	315
v. Keys	189		
v. Mears	339		
v. Wood	3, 727, 781	X.	
Woodfall's Case	254		
Woodland v. Fuller	540	Xenos v. Wickham	697
Woods v. Dike	677		
Woodward v. Cowing	187	Y.	
Woollam v. Hearne	685		
Worcester Corn Exchange Com- pany, <i>In re</i>	465, 476	Young v. Fowler	1
Wordsworth v. Wood	23	v. Mackintosh	96
Worsley v. De Mattos	540	v. Robertson	21
Wortham v. Pemberton	859	v. Smith	563
Wren v. Bradley	956	v. Stoell	1
v. Hynes	18	v. Storer	23
Wright v. Callender	590, 993, 994, 995	v. Ward	540
v. Chard	782		
v. Methodist Episcopal Church	197	Z.	
v. Morley	859, 866		
v. Simpson	139	Zouch v. Forse	208
v. Wright	30	v. Parsons	3
		Zulueta's Case	575

# **REPORTS OF CASES**

**ARGUED AND DETERMINED**

**IN THE**

**HIGH COURT OF CHANCERY.**



# REPORTS OF CASES

## ARGUED AND DETERMINED

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### EDDLESTON v. COLLINS.

1853. January 17, 18, 27. Before the Lord Chancellor Lord CRANWORTH and the LORDS JUSTICES.

A surrender by a husband and wife of the wife's copyhold estate taken out of Court by a deputy steward who was under age, and by whom the wife was separately examined, *Held* to be valid, the infancy of the deputy steward forming no ground of objection.

A surrender made as above mentioned was expressed to be to such uses in favour or for the benefit of the husband, his heirs and assigns, and with such powers of sale and other powers and provisos, and chargeable with such sums as a mortgagee (to whom a conditional surrender had some time previously been made to secure 50*l.*) should, at the request and by the direction of the husband appoint, and subject thereto to the use of the mortgagee and his heirs, with a proviso for making the surrender void on payment of the sum of 100*l.* then advanced by the mortgagee to the husband: *Held*, that the destination of the equity of redemption was completely changed by the last-mentioned surrender, and was not merely affected to the extent required for the purposes of the security thereby created: *Held*, also, that the lord, having accepted a surrender in the above form, was bound by it.

*Seemle*, that he could not have been compelled to accept it.

*Seemle*, that, in a foreclosure suit, it is not competent for the defendant to impeach the mortgage on the ground of fraud without instituting a cross suit.

In this case, Thomas Collins and Mary Ann his wife, on the 3d December, 1846, surrendered certain copyhold premises, being the estate of the wife, to Stephen Adcock, by way of mortgage. The separate examination of Mrs. Collins was taken out of Court by the deputy steward of the manor, who then wanted three months of being of the age of twenty-one years; and the main question



raised was, whether the surrender was void by reason of the minority of the deputy steward. The Vice-Chancellor Sir GEORGE

TURNER decided that it was valid; and the defendants, the \* 2 married woman and her \* husband, now appealed. The facts of the case are given at length in the report of the hearing before the Vice-Chancellor, contained in the tenth volume of Mr. Hare's Reports, page 99, and will also be found sufficiently stated in the judgment of the Lord Chancellor.

*Mr. Elmsley* and *Mr. Smythe*, for the plaintiff, who was a transferee of the mortgage, supported the decision of the Vice-Chancellor. — It is contended, on the other side, that this surrender is void, on the authority of the case of *Scamler v. Waters*, (a) and on the adoption of that decision by Lord COKE, in Co. Litt. 3 b: it has, however, been denied to be law in *Young v. Fowler*, (b) from the report of which, as given in March's Reports, page 38, it appears that JONES, J., said (see page 43) that *Scamler's Case* was adjudged contrary to what is reported in Croke: it cannot therefore be relied on as an authority. (c) An infant, though incapable by law of performing acts of a judicial nature, is not so as to acts which are merely ministerial: Bacon's Abr. tit. Infancy and Age, E, *Young v. Stoell*, (d) *Crosbie v. Hurley*; (e) and it is submitted that the act done in the present case was of the latter character. There is positive authority in the plaintiff's favour; for in Coke's Copyholder, section 45, page 127, ed. 1650 (page 104, ed. 1764), the following passage occurs: "The law is not very curious in examining the imperfections of the steward's person, nor the unlawfulness of his authority; for be he an infant, or *non compos mentis*, an idiot or lunatick, an outlaw, or an excommunicate, yet what things soever he performeth as incident to his place \* 3 \* can never be avoided for any such disability, because he performeth them as a judge, or at least as custom's instrument: and for his authority, though it prove but counterfeit if it come to exact trial, yet if in appearance or outward shew it seemeth currant, that is sufficient." Very monstrous consequences would follow if a surrender could be avoided on the grounds contended for by the defendants.

(a) Cro. Eliz. 636.

(b) Cro. Car. 555.

(c) See Hargrave & Butler (note 16) on Co. Litt. 3 b.

(d) Cro. Car. 279.

(e) Alcock & Napier's Reports (Irish), 431.

*Mr. Glasse* and *Mr. Beales*, for the defendants, and in support of the appeal. — The appellants may admit that an infant is capable of being a steward, and the reason of this is, that he can act by deputy, as appears from Coke's Copyholder, section 46; but they contend that an infant cannot be the deputy, which is the case now before the Court, Comyn's Dig., tit. Officer, B 2. The functions performed by the steward in reference to admissions, surrenders, &c., and especially as to the separate examination of married women, are judicial and not ministerial. *Tasburgh's Case*, (a) *The King v. Churchwardens of Kingscleere*, (b) *Ile's Case*, (c) *Howard v. Wood*. (d)

They contended further (this and the following point were not apparently noticed in the argument before the Vice-Chancellor) that the surrender could only operate to secure the amount actually due at its date, and could not be extended to sums subsequently advanced, referring, in support of their argument, to the cases of *Jackson v. Innes*, (e) *Wood v. Wood*, (g) *Clark v. Burgh*, (h) *Plowden v. Hyde*. (i) They also insisted that the circumstances \* of the transaction established a case of fraud prac- \* 4 tised on Mrs. Collins.

*Mr. Stevens* appeared for other parties defendants, but took no part in the argument.

*Mr. Elmsley* replied. — He cited *Zouch v. Parsons*, (k) in opposition to a distinction which had been attempted to be drawn in argument, between an infant being appointed to an office, and acting in discharge of the duties of that office. He submitted that the clear intention of the transaction was to give a power to create further charges, and that there was no pretence for saying that Mrs. Collins was not fully aware that such was the case.

At the conclusion of the argument, and in answer to a question which had been put, whether a steward might surrender to himself,

(a) 1 V. & B. 507.

(e) 1 Bli. 104.

(b) 2 Levinz, 18.

(g) 7 Beav. 183.

(c) 1 Vent. 153.

(h) 2 Coll. 221.

(d) 2 Shower, 23.

(i) 21 Law J., Ch. 329, 796; since reported also, 2 De G., M. & G. 684.

(k) Burr. 1794, p. 1800.

*Mr. Glasse* referred to the fourth question and answer, in the case of *Erish v. Rives*. (a)

The following authorities were also mentioned and commented on, in the course of the argument on the main question: Co. Litt. 78 *b*; Co. Litt. 107 *b*, note *m*; Co. Litt. 117 *b*, 118 *a*, as to averring against an act of a Court of Record; 2 Inst. p. 514, pl. 15, as to the separate examination of married women; Comyn's Dig., tit. *Enfant* (B) and (C 1); Viner's Abr. tit. *Enfant* (C); Scriven on Copyhold, cap. IV.; Lyttleton's Tenures, p. 320 (Watkin's ed.); Seton on Decrees, pp. 257, 258 (ed. 1830); Turner and Venables' Chancery Practice, vol. 2, p. 85; *Parker v. Keck*, (b) *Hearle v. Greenbank*. (c)

\* 5 *Mr. Lee*, as *amicus curiæ*, and in reference to the \* point of alleged fraud, mentioned the case of *Bulkley v. Wilford*. (d)

THE LORD CHANCELLOR. — This was a bill filed by Martha Eddleston, seeking to obtain a decree of foreclosure in respect of a mortgage debt, as she alleges, of 600*l.*, with an arrear of interest; and the circumstances of the case are these.

In the year 1843, a lady of the name of Mary Ann Ward, then unmarried, was admitted, as devisee of her father, to a copyhold estate of inheritance holden of the manor of Lyles in the county of Cambridge, to her and her heirs according to the custom of the manor, in the usual way. That lady married a gentleman of the name of Collins; and it is an admitted fact, the common case of both parties, that on the 20th May, 1844, she and her husband concurred in making a valid surrender of the copyhold estate in question to a gentleman of the name of Stephen Adcock, a solicitor at Cambridge, by way of mortgage to secure to him the sum of 50*l.* There is no dispute but that Miss Eddleston, having, by the circumstance of the transaction to which I will presently advert, now become the assignee of Adcock, is to that extent entitled to the relief she asks; but, as I have stated, she seeks to be treated as mortgagee for 600*l.*, and not only for that 50*l.*

The next and material transaction occurred at the end of the

(a) Cro. Eliz. 717.

(c) 1 Ves. 298, p. 303.

(b) Com. 84.

(d) 2 Cl. & Fin. 102.

year 1846. On the 3d December in that year, Mr. Collins and his wife made another surrender to Mr. Adcock, in consideration of a further advance of 100*l.*, and the terms of that surrender were of an unusual nature. It was, — “Be it remembered, that on the 3d day of December in the year of our Lord 1846, Thomas Collins and Mary Ann his wife, formerly Mary Ann Ward spinster, customary or copyhold tenants, or one of them a customary \* or copyhold tenant, of the said manor, came before John \* 6 Gillam Bell the younger, gentleman, deputy steward of Clement Francis, gentleman, chief steward of the said manor, and in consideration of 100*l.* of lawful English money to the said Thomas Collins and Mary Ann his wife paid by Stephen Adcock of Cambridge in the said county of Cambridge, gentleman, the said Mary Ann Collins being first privately examined by the said deputy steward separately and apart from her said husband and freely and voluntarily consenting, did out of Court surrender” to the lord, &c., all that messuage (describing it), and all the estate, &c., to such uses, upon such trusts, and to and for such estates, ends, intents, and purposes in favour or for the benefit of T. Collins, his heirs and assigns, and with, under, and subject to such powers of sale and other powers, provisos, declarations, and agreements, and charged and chargeable with the payment of such sum and sums of money, as S. Adcock, his heirs, executors, administrators, or assigns, by any deed or deeds in writing to be by him, them, or any of them legally executed should at the request and by the direction in writing of the said T. Collins, his heirs, executors, administrators, or assigns, at any time direct, or, in default, to the use of S. Adcock, his heirs and assigns for ever, subject to the former conditional surrender for 50*l.*, and with a proviso that if T. Collins, his heirs, executors, administrators, or assigns, should pay or cause to be paid to the said S. Adcock the said principal sum of 100*l.* with interest on the 3d June then next, the surrender was to be void. Thus it was a surrender not merely to secure the sum of 100*l.* further advance, but it was a surrender substantially to the husband, because it was to the use of the husband for such uses as S. Adcock should appoint for the benefit and by the direction of T. Collins, so that it gave the same control over the estate to Collins with \* the consent of Adcock, as it \* 7 gave to Adcock with the consent of Collins, the object of the parties being, I think, clear, from what is disclosed in the case,

and to which I shall presently advert, to give the husband the absolute control over the estate.

The first question made upon the pleadings is as to the validity, in point of law, of the surrender; for the defendants say that this surrender, independently of its particular contents, supposing it had been a surrender in the ordinary form to secure 100*l.*, or any other form, was void, because the deputy steward who took the surrender was an infant under the age of twenty-one years; and what is contended is, that the infancy of the acting steward is a disqualification such as makes all acts of that steward absolutely null and void in point of law. The young man who took the surrender was in truth under age; the surrender was in the beginning of December, and he did not attain his age of twenty-one years until the 24th February, 1847.

In order to support that proposition, several old authorities were referred to, all, I think, resolving themselves into what is stated in Coke's Copyholder; but though those subsequent authorities are mere copies or transcripts of what is there found, or what Lord COKE says may be a transcript of something else, of what was agreed as law in his time, they have this effect, that they have the additional weight that those who followed Lord COKE saw no reason to doubt the validity of his decision. In the forty-sixth section of his Treatise on Copyholds he says, "If an office of stewardship descend unto an infant, he may make a deputy, because the law presumeth he is himself incapable to execute it;"

and then other passages are to be found, partly there and partly \* 8 in Coke upon Lyttleton, 3 B, which go to the effect \* that an infant "cannot be a steward." The question then is, what is the meaning of "cannot be a steward?" There is a case of *Scamler v. Waters* referred to on this point, the decision of which is unintelligible as collected from the report in Croke, but perhaps it means no more than that an infant could not maintain an assize or real action for the office of steward as an office; but whatever be its meaning, I think that for all practical purposes the law on the subject, supposing it to be stated distinctly that he cannot be a steward or a deputy steward, must be read with the qualification that Lord COKE sets out at length, and which is adopted in all subsequent writers, in these words; [His Lordship here read the passage from Coke's Copyholder, above set out, p. 2.] That is the distinct authority of Lord COKE, and it is an authority so much

in conformity with the convenience of mankind, that even if any doubt had been cast upon it, which I do not find there has been, I should be very reluctant indeed to listen to any suggestion of it, because the danger to titles would be enormous if it could be said that a transaction as to which parties have no means of inquiring except by looking on the Court rolls, is absolutely void by reason of infancy, or idiocy, or *non compos mentis*, or lunacy, or outlawry, or excommunication, attaching to some person as to whom there was no evidence at the time that any such disability did attach. If we were to hold an instrument to be void on such a ground as this, we should, as it seems to me, be introducing difficulties quite insuperable, and leading to inconvenience, the amount of which can hardly be calculated. Finding, then, an authority in opposition to the objection distinctly stated in that elaborate way by Lord COKE, I have no difficulty in coming to the conclusion that the objection cannot be sustained.

It was admitted here, that though the deputy steward \* was \* 9 in truth under the age of twenty-one years, he was, unless that circumstance was in itself an objection, just as competent as he would have been three months afterwards, when he would have been of age. The law, of course, in drawing the line, is bound to say that however little a case is on the one side or the other of the line, the consequence of being on that side on which it is must follow. If, therefore, it was positive law that every thing done by this person was void, the circumstance that he was very near the age of twenty-one years would be immaterial ; but if such be not the law, and it be only a matter of argument, this is pre-eminently a case to which the maxim, "*fieri non debet factum valeat*," ought to apply. I am thus led to the conclusion that there is no legal invalidity in the surrender by reason of the infancy of the deputy steward.

There was one argument adduced at the bar to which I will here advert. It was said that the steward, though an infant, might perhaps be allowed to do ministerial acts, but that the separate examination of a married woman was an act requiring discretion, and to which Lord COKE could not have intended to advert. This distinction cannot, I think, be maintained. Lord COKE meant absolutely to include every act of the steward ; he makes no distinction whatever ; and there is scarcely any act a steward does that may not require some discretion. In the case of most

surrenders there is one important act that always requires very great discretion; namely, the assessment of the fines, which is really done by the steward. Another case of discretion which continually occurs is, where one party claims as heir and another as devisee. It is common to admit them both, and let them litigate the matter; but it has been held to be competent for the steward to say that the will is a false will, a forgery, and on that ground to refuse to admit the devisee.

- \* 10 \* The defendants, however, say that, even supposing the difficulty as to the steward be got over, still the surrender ought only to operate to secure the sum of 100*l.*, which is all that was then advanced; but what is its legal meaning? The instrument is very complicated, and I should say not a very artificial mode of effecting the object which was intended; but it provides that the surrender shall operate to such uses as Adcock, his heirs, &c., by any deed to be legally executed by the request and at the direction of Collins, shall from time to time appoint. I give no opinion whether the lord was bound to accept such a surrender; probably he might not. That sort of question was discussed very much in the case of *Glasse v. Richardson*, argued before us, (a) and in which some authorities of a recent date in the Court of Queen's Bench were quoted. The law very likely may be, that the lord would not be bound to accept such a surrender as this; (b) but having done so, it appears to me not to admit of a doubt that the surrender operated as the language imports, namely, to such uses as Adcock by the direction of Collins should from time to time appoint, and that if Adcock did afterwards by deed direct or appoint with the consent of Collins that that surrender should enure to particular uses, it would so enure. There is no doubt that subsequently to the execution of this deed, Adcock by the direction of Collins did direct that it should enure from time to time to secure further sums of money, ultimately making the sum of 600*l.*, all of which was in fact paid by the present plaintiff. It appears that the four first advances made after the original advance in 1846 were made by deeds, to two of which Adcock was a party, and to two of which \* he was not a party, but they all recited the former advances; and to the transaction,

(a) Since reported 2 De G., M. & G. 658.

(b) So held by the Court of Common Pleas in *Flack v. The Master, Fellows, and Scholars of Downing College*, 17 Jur. 697.

when Miss Eddleston made the final advance and took a transfer of the security, Adcock was a party, and executed the deed. Treating, therefore, the surrender as valid, and the transaction as in conformity to the language of the surrender, which it clearly was, the estate became vested in Miss Eddleston, to secure the sum of 600*l*.

The defendants next say, that, supposing there be no objection by reason of the infancy of the deputy steward, and that the power given by the surrender has been from time to time properly executed, still it has only been properly executed in form, for that in truth Mrs. Collins was imposed upon and did not know what she was executing; that the surrender was never explained to her, and that she did not mean to do more than authorize the raising of the additional 100*l*. beyond the first 50*l*., which was, *ex concessis*, a good advance. If that were so, though perhaps the more strict course would have been to file a cross bill to set aside the transaction, yet I conceive the point may be raised by way of defence, by saying for what sum the plaintiff is to be considered as a mortgagee.

For the purpose of ascertaining how the matter stands on this point, it must be seen what the evidence in the cause is. Mrs. Smith (Mr. Collins having died, Mrs. Collins subsequently married Mr. Smith), by her answer (and she has been examined as a witness also), says that the surrender was never explained to her, that she did not know what she was doing, and she thought she was only giving her husband the power of raising the additional 100*l*.; but I must look at all the evidence, and see if what she thus states is in conformity with the facts as to which there is no doubt in the cause.

\* The plaintiff, in order to negative this, examined Mr. \*12 Adcock, and as I consider him to be substantially the plaintiff in the case, I look at his evidence with that suspicion which is to be attached to the evidence of a party in a cause. The same observation applies to the evidence of Mrs. Smith. Mr. Adcock, however, gives the most detailed account of the whole transaction, and what he states in substance is this, — that previously to the advance of the 100*l*. in September, 1846, Mr. and Mrs. Collins came to him and said that they wanted then to raise 100*l*., and that they should from time to time want to raise further sums, for they were going to cultivate the farm in question themselves, and therefore should want money from time to time, and they desired



to know, if the estate was given up to the husband, whether he must be admitted,—that was not the expression, but something to that effect,—for that they were told was expensive; Adcock told them that it would cost about 100*l.* for him to be admitted, and thereupon he took the opinion of counsel, and instructed counsel to prepare, if possible, such a surrender as should enable money from time to time to be raised without incurring the necessity of admitting the husband. In confirmation of that, there is the fact that there is the very document, proved in evidence in the cause, which he laid before a gentleman at the bar, instructing him to prepare a surrender that would enable that object to be carried into effect. It may be said, indeed, that that was only part of the scheme to defraud this lady; but on that I must observe, that I can discover no motive at all on the part of Adcock to concur in a criminal conspiracy with the husband to deprive the wife of her estate, unless we are to suppose, without any sort of evidence on the subject, that he was to receive something by way of a bribe for effecting this object; and it is inconsistent with any object so wicked,

\* 13 that the parties lay by for a long time, \* raising in the course of the next year 50*l.*, and at the end of that year another 50*l.*, and so on from time to time little sums, exactly in conformity with what they would be doing if Mr. Adcock's statement is correct, but quite inconsistent with the notion that they wanted immediately fraudulently to cheat this lady out of the estate. It seems to me, therefore, that all probability goes along with the story which Mr. Adcock tells, that that was the original intention, that afterwards from time to time Mr. and Mrs. Collins came to his office applying for further money, she as often as he, sometimes both together, sometimes the husband without the wife, and sometimes the wife without the husband, but that what was going on was always perfectly well known to all of them. That is the case of Mr. Adcock, a party to the suit, against the evidence of Mrs. Smith, the other party.

Then how are these statements on one side or the other confirmed? There is no confirmation whatever of the account given by Mrs. Smith of the facts as she represents them, but on the part of Mr. Adcock there is very strong confirmation by the testimony of one of his clerks, Mr. Rook, against whom, as far as I know, there is not a breath of suspicion. He has no interest in the subject, and what he says is this:—

[His Lordship here read Mr. Rook's evidence, in which, among other things, he stated, — that Mrs. Collins, on one occasion subsequent to December, 1846, desired Mr. Adcock to raise a sum of money for her husband; that in September, 1847, she joined with her husband in executing the security prepared for the amount raised, namely, 64*l.*; that on the 30th May, 1849, she called at the office of Mr. Adcock, and inquired the amount then due from her husband, and was informed that it was \* 600*l.*, and Mr. \* 14 Adcock then explained to her how it was made up; that on the 6th and 13th June, 1849, she called again at the office of Mr. Adcock, who produced his books of accounts signed by Mr. Collins, and Mrs. Collins then said that she did not expect that her husband had had more than 450*l.*: — and his Lordship remarked, that Mrs. Collins did not question that she had given her husband the power to get as much as he could obtain, but that she wished to look at the books, because she did not expect that he had had more than 450*l.*.]

Although I must not be understood as meaning that this would be sufficient to pass Mrs. Collins's interest, if she had not executed the surrender of December, 1846, yet it is strongly corroborative of the truth of what Mr. Adcock says, that all was done with her entire privity, and that every thing was explained to her. Unless that be true, all her conduct afterwards is irreconcilable with the conduct of a rational person; and I therefore think that, on this point, the defendants have failed, and that there is nothing leading to the conclusion that any fraud was practised. The plaintiff is thus to be treated as a mortgagee for 600*l.*, and the decree below was perfectly correct.

THE LORD JUSTICE TURNER. — At the request of my learned brother, I have next to state my opinion upon this case. Having already, in the Court below, fully entered into the question of the capacity of an infant deputy steward, of competent understanding, to take the surrender of a copyhold estate, and determined that he was capable of doing so, it is unnecessary for me to say more upon that point than that my opinion has not been altered by any thing which I have heard in the re-argument, or by the further consideration which I have given to the question.

\* In the course of the argument upon the appeal, however, \* 15

two or three points have been brought forward which were not adverted to in the Court below ; and I think it right, therefore, to make a few observations upon those points.

It has been argued, on the part of the appellants, that this case falls within the principle of the cases in which it has been held, that upon mortgages of the estates of married women, the old uses were not altered by the equity of redemption being reserved to parties who would not be entitled under those uses. But those cases do not appear to me to apply to the present, or in any degree to assist the appellants' case. They proceed, as I apprehend, upon this principle, that, the purpose of the deed being to create a mortgage, the Court will not, merely from mere trifling and partial alterations in the reservation of the equity of redemption, imply an intention not merely to create the mortgage, but also to alter the uses. The Court is to collect what was the intention of the parties in the transaction. The nature of the transaction distinctly evidences one intention, and the Court will not, from trifling circumstances, impute another. But in the present case it distinctly appears by the surrender that the intention was not merely to create a present mortgage, but to give power to create further charges ; and nothing which I can find in the cases referred to would warrant the extension of them to such a case. The case of *Jackson v. Innes*, (a) in the House of Lords, seems to be very strongly opposed to this argument on the part of the appellants. The question here is, on the right to create the further charges, and not on the right to the ultimate equity of redemption, subject to the charges when created.

\* 16     \* The appellants then attempted to impeach the securities, upon the evidence taken in the cause. But the appellants are defendants in this cause, and I feel great doubt whether it is competent to them to do so. The plaintiff's security is, I must now assume, well created by deed, and I rather apprehend that such a security, if impeached at all, must be impeached by cross bill. The security is good until impeached ; and to allow the defendant to impeach it by her answer, and by evidence on her part, would be to make a decree in favour of the defendant, upon the application of the plaintiff. If the defendant were at liberty thus to impeach the plaintiff's title, she must be equally at liberty

(a) 1 Bli. 104.

wholly to subvert it ; and the consequence of allowing this would be, that plaintiffs coming to this Court for relief might find themselves in the position of being decreed to convey to the defendants. The objection to decreeing relief upon the answers of defendants is perhaps founded on deeper reasons than may at first sight appear. It may be the medium of compelling defendants to do justice to plaintiffs, by putting any legal rights which they may have under the control of the Court, and of thus giving effect to the rule, that he who comes into equity, must do equity.

The only other point to which I think it necessary to advert is the offer now made on the part of the appellants to file a cross bill, the Court in the mean time suspending the decree. It is, I apprehend, within the power of the Court to grant this indulgence. But what is asked of the Court is clearly indulgence. The ordinary course of the Court is not to stop the progress of the cause unless the cross bill is filed in due time. Upon a motion to adjourn a cause upon the ground of a cross bill having been filed, in *Coates v. Pearson*, (a) Sir JOHN LEACH says, \* " If \* 17 the cross bill had been filed in due time, you might have moved to stay publication in the original cause until an answer had been put in, but you cannot now stop the progress of the cause." Have, then, the appellants made a case entitling them to the extraordinary indulgence of suspending the decree in the original cause, not at the original hearing, but at the rehearing? I am of opinion that they have not. I think it clear upon the evidence, that this lady well knew that her late husband was borrowing money on the estate, and was herself instrumental in borrowing it. This, I think, is fully proved by the plaintiff's evidence, and the lady does not, in her evidence, assert the contrary. I think that the case set up by this lady of fraud upon her in procuring the surrender, is entirely an afterthought on her part. The evidence seems to me to prove that the original dispute in this case was, whether more than 450*l.* was due on the securities, not whether there had been any fraud in the surrender ; and that, at a later period of the dispute, the question raised by this lady's solicitor on her part was, not whether there had been fraud in the surrender, but whether the lady could not defeat it upon the legal ground of the infancy of the deputy steward. These

(a) 4 Madd. 262.

are circumstances which might not defeat the right of the appellants to relief in equity; but, in my opinion, they are circumstances which disentitle them to any extraordinary indulgence from the Court; and I therefore concur in the opinion, that this appeal ought to be dismissed.

THE LORD JUSTICE KNIGHT BRUCE. — In the present case there are questions of law, of equity, and of fact, which, with or without sufficient reason, have appeared and still appear to me of difficult solution, and doubtful. While my mind was in this condition upon the matter, I found from the Lord Chancellor and the  
 \* 18 Lord Justice TURNER, that they had made up \* theirs, and were agreed as to the proper mode of dealing with the cause, a circumstance which rendered it necessarily unimportant what my views of the case might ultimately be. And I thought it consequently better for the parties that they should not be kept longer in suspense, by reason of my undetermined state of opinion; a state which might not soon end, or might possibly be never wholly removed. I requested their Lordships, accordingly, not further to postpone disposing of the appeal. This their Lordships have now done; the judgment of the Court being one to which possibly a more prolonged consideration of the questions in dispute between the parties might bring me to assent, though at present I do not do so.

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### NEATHWAY v. REED.

1858. January 20. Before the Lord Chancellor Lord CRANWORTH and the LORDS JUSTICES.

A testatrix by her will gave thus, "to my sister C. N.'s surviving children 30l. each;" she then gave to C. N. thus, "the interest of my funded property for and during her natural life, and after her decease such property to be equally divided between her surviving children." *Held*, that though on the construction of the word "surviving" in the first clause, the period of vesting and distribution was referable to the death of the testatrix, yet that the period of vesting in the last clause was to be referred to the death of C. N., and that those children only who survived C. N. were entitled.<sup>1</sup>

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<sup>1</sup> See *Re Gregson's Trust Estate*, 2 De G., J. & S. 428; *Van Tilburgh v.*  
 [ 14 ]

On an appeal from the whole of an order made on a claim, the plaintiff is entitled to begin.

THIS was a motion of the defendant William Reed, by way of appeal from an order, dated the 17th November, 1852, pronounced by Vice-Chancellor STUART, on the claim of the plaintiff, whereby it was declared that the plaintiff was, under the will of Elizabeth Lynch deceased, entitled to one-fourth of the clear residue of her personal estate, under the following circumstances.

The question arose upon the will of Elizabeth Lynch, dated the 12th June, 1828, which, after giving certain pecuniary legacies, and appointing the defendant \* William Reed, and John \* 19 Dodd who had since died, executors, was as follows: "I give and bequeath unto my sister Ann Hilditch 50*l.*; and to my brother Thomas Hilditch's two daughters 30*l.* each, that is to say to Mrs. Elizabeth Barton, now living at Tunbridge Wells, and Mrs. Mary Smart, now living at Ruthen in Wales; and to my brother William Hilditch's surviving children 30*l.* each; and to my sister Catherine Neathway's surviving children 30*l.* each. I also give and bequeath unto my sister Catherine Neathway the interest of my funded property (whatsoever may be remaining after the lega-

Hollinshead, 1 McCarter (N. J.), 32; Olney v. Hull, 21 Pick. 311; Hurlburt v. Emerson, 16 Mass. 241; Augustus v. Seabolt, 3 Met. (Ky.) 155; Sharp v. Sharp, 35 Ala. 574; Carver v. Burgess, 7 De G., M. & G. 96; *In re Crawhall's Trusts*, 8 De G., M. & G. 480; Hesketh v. Magennis, 27 Beav. 395; Thompson v. Thompson, 29 Beav. 654; Essex v. Clement, 30 Beav. 525; Drakeford v. Drakeford, 33 Beav. 43; Naylor v. Robson, 34 Beav. 571; *Re Fox's Will*, 35 Beav. 163; Howard v. Collins, L. R. 5 Eq. 349; Wren v. Hynes, 2 Met. (Ky.) 129. In *Blanchard v. Blanchard*, 1 Allen, 223, where a testator, after devising to his wife all the income of all his real and personal property during her natural life, devised to five of his children as follows: "all the property, both real and personal, that may be left at the death of my wife, to be divided equally between the last five named children; and provided, furthermore, that if any of the last five named children die before my wife, then the property to be equally divided between the survivors;" it was held that the children named took vested remainders. See *Moore v. Lyons*, 25 Wend. 119; *Fulton v. Fulton*, 2 Grant's Cas. 28; *Blackmore v. Snee*, 1 De G. & J. 455; *Howard v. Howard*, 21 Beav. 550; *Lill v. Lill*, 23 Beav. 446; *Evans v. Evans*, 25 Beav. 81. In *re Keep's Will*, 32 Beav. 122, it was said that the rule of law, as laid down by modern authorities, is, that the word "survivors" is to be confined to its literal signification, of survivors at the period spoken of by the testator, in every case where it is possible to do so without violating the clear meaning of the rest of the will. See *Bolitho v. Hillyar*, 34 Beav. 180; *Wren v. Hynes*, 2 Met. (Ky.) 129.

cies are paid) for and during her natural life, and after her decease such property to be equally divided between her surviving children. It is also my desire that the money which will be derived from the funds at my decease, by the will of my late husband John Lynch, with the money I may have at the saving-bank at Southampton, should be first used in paying the before-mentioned legacies, and which moneys my executors are hereby authorized and empowered to take for that purpose; and if those moneys should not be sufficient to do so, then they are to sell out from the three per cent consols enough to defray that expense, the remainder then left in the three per cent consols to be made use of, to my sister Catherine Neathway, and to her surviving children as before mentioned." The testatrix soon afterwards died.

The claim stated, and the facts were not controverted, that Catherine Neathway had at the death of the testatrix five children, namely, Catherine Neathway, Margaret Clark, Mary Lee, Elizabeth Creasey Dodd, and the plaintiff William Howard Neathway; that Elizabeth Creasey Dodd was the wife of John Dodd the executor,

and died before her mother Catherine Neathway; that Catherine Neathway the mother received \* during her life all the interest of the residuary estate of the testatrix, and died on the 4th July, 1845, leaving only four children her surviving; that John Dodd, as the administrator of Elizabeth Creasey Dodd, had claimed and received from himself and William Reed, his co-executor, one-fifth part of the residue in right of his wife, and died in February, 1851; and that Catherine Neathway the younger, Margaret Clark, and Mary Lee, had also agreed to take, in full of all demands, and in fact received, each one-fifth part thereof; that the remaining fifth had been transferred into Court by William Reed, the surviving executor, under the powers of the Trustee Relief Act.

The plaintiff claimed, under the above circumstances, to be entitled to one-fourth, and not merely to one-fifth, of the residuary estate of the testatrix; and the Vice-Chancellor STUART having held that the plaintiff was so entitled, the defendant J. Reed now appealed.

*Mr. Elmsley* and *Mr. Younge*, for the appellant, claimed the right to begin, but the Court held, as in *Sims v. Helling*, (a) that

(a) 2 De G., M. & G. 291.

as the appeal was from the whole order made on a claim, the plaintiff, in analogy to the practice in a cause appeal, had the right to begin.

*Mr. Cairns*, for the plaintiff. — The order of the Vice-Chancellor is correct: the word “surviving” is a word of relation, and the rule of the Court, as established by a long series of decisions, is to refer it to the period of distribution. *Cripps v. Wolcott*. (a)

\* *Mr. Elmsley* and *Mr. Younge*, for the defendant J. Reed, \* 21 supported the appeal. — The vesting of the shares took place at the death of the testatrix, who has put her own construction on the word “surviving” in the sentence of the will immediately preceding that on which the question has arisen. They referred to *Leeming v. Sherratt*. (b)

[The Lord Justice KNIGHT BRUCE mentioned the case of *Walker v. Shore*. (c)]

*Mr. Cairns*, in reply, cited *Taylor v. Beverley*, (d) and submitted that in many cases, in construing wills, the Court had given a different interpretation to the same word, when occurring in different parts of the same will. *Carter v. Bentall*. (e)

THE LORD CHANCELLOR. — I am of opinion that the Vice-Chancellor’s judgment is perfectly right. The question in each case as to who is meant by the use of the word “survivor” is often one of difficulty: the testator very frequently does not himself know in what sense he uses the term: in such cases the established rules of construction must be referred to in order to determine the meaning.

According to the old principles of law, the rule was that the period of vesting should be at the moment of the testator’s death.<sup>1</sup> Now, however, in putting a construction upon the word “surviving,” reference is had to the intention of the testator as discoverable from the whole will.<sup>2</sup> In my opinion, when an estate is

(a) 4 Madd. 11.

(c) 15 Ves. 122.

(e) 2 Beav. 551.

(b) 2 Hare, 14.

(d) 1 Coll. 108.

<sup>1</sup> See 2 Jarman Wills (3d Eng. ed.), 672 *et seq.*

<sup>2</sup> See *In re Keep’s Will*, 32 Beav. 122.



given to a person for life, and after his death to his surviving \* 22 children, those only of the children who survive the tenant for life will take.<sup>1</sup> It has been said, that although such may be the general rule of construction, yet that there is something in this case to take it out of that rule, because there were legacies of 30*l.* each to the surviving children of the testator's sister, clearly independent of the rule to which I have referred; and it is said that because the period of the testatrix's death and of the distribution is in that clause coincident, therefore that the last sentence of the will must be so construed. It is well established, however, that the same words occurring in different parts of a will are not necessarily to have the same meaning attributed to them, but they must be construed in each instance by reference to the context.<sup>2</sup>

THE LORD JUSTICE KNIGHT BRUCE. — The gift in question is in these words: "I also give and bequeath unto my sister Catherine Neathway the interest of my funded property (whatsoever may be remaining after the legacies are paid) for and during her natural life, and after her decease such property to be equally divided between her surviving children." Unless there is something in the context to control the meaning of these words, the children referred to must be taken to be those who were living at the death of Catherine Neathway. It is, however, said that there is something in this will which shows that a different meaning must be given to the word "surviving," inasmuch as, immediately before the bequest in question, there is one thus expressed: "to my sister Catherine Neathway's surviving children 30*l.* each;" and it is said, that as in this bequest the word "surviving" must refer to the testatrix's death, it must also refer to the same period in the other. The argument is plausible, and raises some doubt, but is not, in my opinion, of sufficient weight to justify a departure from the ordinary rule of interpretation.

<sup>1</sup> See 2 Jarman Wills (3d Eng. ed.), 679 *et seq.*; *Dorville v. Wolff*, 15 Sim. 510; *Davies v. Thorns*, 3 De G. & Sm. 347; *Carver v. Burgess*, 18 Beav. 541; *Eaton v. Barker*, 2 Coll. 124; *Young v. Robertson*, 8 Jur. N. S. 825; *Huffman v. Hubbard*, 16 Beav. 579; *Hind v. Selby*, 22 Beav. 373. See the remarks of Lord CRANWORTH on the rule stated in the text, in *Blackmore v. Snee*, 1 De G. & J. 455, 459, 460.

<sup>2</sup> See 2 Jarman Wills (3d Eng. ed.), 708, 709; *In re Crawhall's Trusts*, 8 De G., M. & G. 480.

\*THE LORD JUSTICE TURNER. — My opinion in this case \* 23 entirely coincides with that expressed by the Lord Chancellor. The argument on behalf of the appellant is, that the term "surviving children" having a particular meaning in the first gift, must receive the same meaning in the second gift. But the reason why the phrase in the first clause must be held to designate children surviving at the death of the testatrix is, that there is no other period to which the term "surviving" could in that instance refer. The same observation does not apply to the second clause. As regards that clause, there are two periods, to either of which the term "surviving" might apply, — either the death of the testatrix, or that of the tenant for life, — and the question is to which of those periods it must be taken to refer. Now, it is an established rule, that, if possible, some effect must be given to every word of the will. If the gift had been to Catherine Neathway for life, and after her decease to "her children," without the word "surviving," the children living at the testatrix's death would have taken.<sup>1</sup> I think that some effect must be given to the word "surviving," and that it must mean, surviving Catherine Neathway. The case of *Wordsworth v. Wood*, (a) before the House of Lords, confirms me in this opinion.

(a) 1 H. L. Cas. 129.

<sup>1</sup> See 2 Jarman Wills (3d Eng. ed.), 795 *et seq.*; (4th Am. ed.) 653 [760] *et seq.* and cases cited; *Shattuck v. Stedman*, 2 Pick. 468; *Stott v. Price*, 2 Serg. & R. 59; *Bunch v. Hurst*, 3 Desaus. 286; *Perry v. Rhodes*, 2 Murph. 140; *Blamire v. Geldart*, 16 Ves. 314; *Childs v. Russell*, 11 Met. 16; *Eldridge v. Eldridge*, 9 Cush. 516; *Green v. Howell*, 1 Vroom (N. J.), 326; S. C., 2 *ib.* 570; *White v. Curtis*, 12 Gray, 54; *Edwards v. Gibbs*, 39 Miss. 166; *Clark v. Wallace*, 48 Penn. St. 80; *Chambers v. Payne*, 6 Jones Eq. 276; *Sims v. Smith*, 6 Jones Eq. 347; *Conly v. Kincaid*, 1 Wins. (N. C.) No. 2 Eq. 44; *Wight v. Shaw*, 5 Cush. 56, 60; *Forsyth v. Rathbone*, 34 Barb. (N. Y.) 388; *Burd v. Burd*, 40 Penn. St. 182; *Hocker v. Gentry*, 3 Met. (Ky.) 463; *Ross v. Drake*, 37 Penn. St. 373; *Hawkins v. Everett*, 5 Jones Eq. 42; *Chew's Case*, 37 Penn. St. 23; *Young v. Storer*, 37 Penn. St. 105; *Nash v. Cutler*, 16 Pick. 491; *Emerson v. Cutler*, 14 Pick. 108; *Barker v. Woods*, 1 Sandf. Ch. 129; *Nichols v. Denny*, 37 Miss. (8 Geo.) 59; *Annable v. Patch*, 3 Pick. 360; *Fay v. Sylvester*, 2 Gray, 171; *Barton v. Bigelow*, 4 Gray, 353; *Pike v. Stephenson*, 99 Mass. 188; *Abbott v. Bradstreet*, 3 Allen, 587; *Putnam v. Gleason*, 9 Mass. 454; *Womrath v. McCormick*, 51 Penn. St. 504.

1853. January 21. Before the Lord Chancellor Lord CRANWORTH and the LORDS JUSTICES.

Lands were settled to such uses as Sir C. M. and his son should by deed jointly direct, and subject thereto to Sir C. M. and his son successively for life, with remainders over to the sons of the son in tail. A railway company having under their Act power to take the lands thus settled, Sir C. M. and his son contracted for the sale to them of a certain part of the lands, and the company were let into possession on an agreement that the amount of compensation should be settled either by arbitration or a jury as Sir C. M. should choose: the company also paid a sum of money to Sir C. M. expressly on account of the compensation money to be ultimately fixed: Sir C. M., however, died before any thing further was done. *Held*, under these circumstances, that there was no contract the specific performance of which the Court could enforce or aid in carrying into effect as a defective execution of the joint power of appointment, at the instance of the son and against the parties entitled in remainder under the settlement.

Where on a sale of property the parties have stipulated that the price shall be ascertained in a particular way, and it is not so ascertained, the Court cannot, in the absence of special circumstances, interfere to aid the carrying out of the contract by having the price ascertained in some different mode.<sup>2</sup>

Whether, where the Court would aid the defective execution of a power against an owner in fee in possession, it would also do so against a remainder-man; and whether, where the assistance of the Court was not requisite to enable the purchaser to obtain the benefit of his contract, the Court would aid the defective execution of a power at the instance of a party deriving benefit from such execution against those whose rights the exercise of the power would defeat, — *quære*, by the Lord Chancellor.<sup>3</sup> ●

THIS was an appeal from an order of the Vice-Chancellor, Sir GEORGE TURNER, dismissing the bill filed by the plaintiff, Sir C. M. R. Morgan, to enforce against the South Wales Railway Company the specific performance of a contract for the sale to them of certain lands. The following are the material facts of the case.

By indenture of settlement dated the 26th November, 1844, and made between the late Sir C. Morgan and his son, the present

<sup>1</sup> S. C., 10 Hare, 284.

<sup>2</sup> *Collins v. Collins*, 26 Beav. 306; 1 Sugden V. & P. (7th Am. ed.) 385, 386 [327], [328]; 2 Story Eq. Jur. §§ 1457, 1457 a; *Scott v. The Corporation of Liverpool*, 3 De G. & J. 384; *Scott v. Avery*, 5 H. L. Cas. 811; *Vickers v. Vickers*, L. R. 4 Eq. 529; *Richardson v. Smith*, L. R. 5 Ch. Ap. 648; *The South Wales Railway Co. v. Wythes*, 5 De G., M. & G. 885-887, and cases in note (1); see Sugd. V. & P. (14th Eng. ed.) 287-289.

<sup>3</sup> See *In re Dykes's Estate*, L. R. 7 Eq. 337.

plaintiff, of the first part, the defendants F. M. Milman and C. O. S. Morgan of the second part, and H. O. Owen and C. F. R. Lascelles of the third part, the lands in question were settled to such uses, upon and for such trusts, intents, and purposes, and with, \* under, and subject to such powers, provisos, agree- \* 25 ments, and declarations as the late Sir C. Morgan and the plaintiff by any deed or deeds legally executed should from time to time or at any time jointly direct, limit, or appoint, and in default of and subject to any such direction and appointment, to the parties of the third part for a term of five hundred years upon certain trusts therein expressed, and subject thereto to the late Sir C. Morgan and the plaintiff successively for life, with remainder to the sons of the plaintiff in tail. It was provided by the settlement that it should be lawful for the trustees, with the consent of the late Sir C. Morgan or other the person who should be entitled under the settlement to the first estate of freehold in the settled estates, to agree with any canal, railway, or other company or projected company as to the amount of consideration to be paid for or in respect of any of the hereditaments by the indenture limited in strict settlement which such company should require, and as to the taking by such company of any further part or parts of such settled premises and the amount of consideration for the same, and as to any compensation for severance of lands, and for any injury or damage to the settled estates which the works of any such company and the purposes to which the same should be applied might occasion, and for the making such bridges, communications, ways, roads, buildings, and erections, and generally to require and agree to all such provisions as should be thought necessary for the protection of the said settled estates or any part thereof in consequence of the works of any such company or the purposes thereof, and that the receipt of the trustees should be a good and sufficient discharge for all moneys payable in consequence of such arrangements with canal, railway, or other companies or projected companies as aforesaid. And the settlement contained a power of \* sale and exchange in the usual form, and \* 26 a declaration that the moneys to be received in consequence of arrangements with companies, and which might arise upon any sale made under the power, should be applied by the trustees in the purchase of other lands, to be held upon the same trusts as the settled estates.

The South Wales Railway Company having power under their Act to take the lands comprised in the settlement, the late Sir C. Morgan, in December, 1845, instructed his solicitor to negotiate with them, intending, as was alleged, with the concurrence of the plaintiff, to convey to the company such part of the lands as they might require, by means of the exercise of the joint power of appointment contained in the settlement. In March, 1846, the company gave the usual notice to take part of the settled lands, and thereupon Mr. T. S. Woolley, a surveyor appointed for that purpose by the late Sir C. Morgan and the plaintiff, valued these lands at 8000*l*.

While this valuation was being made, the late Sir C. Morgan's solicitor wrote to the solicitors of the company the following letter, dated the 16th April, 1846: "The surveyor of Sir Charles and the company are now arranging as to the value, &c.; and as the purchase-money is to be either paid or deposited before possession is taken, I should wish to have an arrangement entered into in regard to the title which the company will require to be shown. The title of Sir Charles Morgan to the estates in Monmouth and Glamorgan, through parts of which the above railway passes, stands thus: By a settlement executed in November, 1844, those estates were under the powers of a former settlement, executed in 1814, appointed, subject to the family and other charges thereon, to the following uses, viz., to such uses as Sir Charles and \* 27 Mr. Morgan should by deed jointly \* appoint, and in default of and until appointment, to the use of Sir Charles for life, with remainders to Mr. Morgan and his sons for their respective lives, with remainders over to their issue in tail, so that under the last settlement Sir Charles and Mr. Morgan can appoint any of the lands required by the company, as absolute owners of the fee. The estates in the above counties, above the family and other charges are of great value, and I hope, therefore, that there will be no objection to Sir Charles and Mr. Morgan receiving the purchase-money, without it being requisite to obtain the consent of any mortgagee thereto. I shall be obliged by hearing from you as soon as possible what course you will adopt, as I shall then know what abstract of title to prepare."

The company declined to give the 8000*l*., the amount of Mr. Woolley's valuation, but offered 7500*l*. As, however, they wanted possession of the land, the following agreement in writing, signed

by Sir C. Morgan's solicitor and by the secretary of the company, was entered into on the 30th July, 1846: "Sir Charles Morgan, Baronet, and South Wales Railway Company. Memorandum. The amount claimed by Sir Charles Morgan (8000*l.*) for and in respect of the 26a. 0r. 6p. of land required by the company in the parishes of Christchurch, Saint Wollos, Bassaleg, and Saint Bride's, in the county of Monmouth, to be deposited in the bank of Messrs. Glynn, in the joint names of John Burley, Esq., and Charles Russell, Esq., M.P., as security for, and until the payment by the company of the sum which shall be awarded or agreed upon. On this deposit being made, possession to be given to the company of the land, the company paying interest at the rate of 4*l.* per cent on the sum to be so awarded or agreed upon from the time of such possession: the company within one month from such possession to proceed without any \* delay to get the amount of \* 28 compensation settled either by arbitration or a jury, as Sir Charles Morgan shall choose." The company accordingly deposited 8000*l.*, and took possession of the lands.

Subsequently the company became desirous to take a further portion of the lands included in the settlement, and these were valued by Mr. Woolley at 7500*l.*, making, together with the 8000*l.*, a total sum of 15,500*l.*, which the late Sir C. Morgan asked from the company. To this demand the company refused to accede, and pending the negotiations on the subject, Sir C. Morgan's solicitor wrote to the secretary of the company the following letter, dated the 24th September, 1846: "Will you have the kindness to inform me whether the directors have any objection to pay over to Sir Charles and Mr. Morgan a portion of the purchase-money for their use: all parties interested in the estate will concur in this arrangement. The 8000*l.* deposited is the amount I now require for Sir Charles. The sum claimed by Mr. Woolley for the other lands will be deposited by the directors in the usual way, after which the total amount of the compensation can be decided upon, either by reference or a jury."

To this letter the following reply was sent by the secretary of the company, dated the 25th September, 1846: "It will be better to let the 8000*l.* already deposited stand as it is, but on any day from Monday, 28th instant, inclusive, that you will be good enough to bring me a receipt from Sir Charles and Mr. Morgan for 7500*l.*, the balance of the 15,500*l.* claimed by Sir Charles, I

shall be happy to hand you a check for the amount, on account of the whole payment to be made for Sir Charles's land as may be determined hereafter. Will you be good enough to let me know when I may expect you here with the receipt?"

\* 29     \* In consequence of this correspondence, the company, on the 30th September, 1846, paid to Sir C. Morgan's solicitor 7500*l.*, and received the following receipt, signed by Sir C. Morgan and the plaintiff: "30th September, 1846. Received this day of the South Wales Railway Company the sum of 7500*l.* on account of the compensation money to be ultimately fixed and to be paid by the said company in respect of the lands part of our estates required for the South Wales Railway." The 7500*l.* was paid to the account of Sir C. Morgan with his bankers. The abstracts of title to the lands comprised in the settlement were delivered to the solicitors of the company, but before any conveyance was executed Sir C. Morgan died, on the 5th December, 1846, having appointed the plaintiff his executor, who duly proved his will accordingly.

The company subsequently negotiated with the plaintiff for the purchase of a further portion of the lands comprised in the settlement, and arranged to pay 20,000*l.* for the whole of the lands thus taken by them, of which 15,366*l.* 5*s.* was attributable to the lands taken before Sir C. Morgan's death, and 4683*l.* 15*s.* to those taken subsequently.

The company having approved of the title, the points remaining to be settled were the form of the conveyance and the mode in which the purchase-money was to be apportioned. To determine these questions, the plaintiff filed his bill against the trustees and the parties entitled under the settlement, and the railway company, stating the facts above mentioned, and that by reason of the death of Sir C. Morgan it became impossible to carry into effect the intended execution of the joint power of appointment, but that

the same ought so far as regarded the lands taken previously  
\* 30     to the death of Sir C. Morgan \* to be treated and considered as having been conclusively agreed to be executed; that the trustees of the settlement ought to be directed to concur with the plaintiff in the conveyance to the company of the said lands; and that the purchase-money for the same ought to be paid to the plaintiff, as the executor of Sir Charles Morgan, the plaintiff for such purpose waiving any right he might have to any

of such purchase-moneys in his individual character. The bill prayed a declaration and direction accordingly.

The point on the other side submitted for the decision of the Court was, that the joint power of appointment had never been completely exercised, and could not then be exercised, and that the whole of the purchase-money ought to be paid to the trustees of the settlement; and that the plaintiff, as the executor of Sir Charles Morgan, ought to repay to them the sum of 7500*l.* received from the railway company as hereinbefore stated. •

The case came on before the Vice-Chancellor, Sir GEORGE TURNER, in July and August, 1852; and on the 12th November, 1852, his Honor made an order declaring that the parties entitled in remainder under the indenture of settlement were not bound by the contracts in the plaintiff's bill mentioned; and, it appearing beneficial to the parties entitled that the offer of the railway company should be accepted, ordering that the plaintiff should pay the sum of 7500*l.* to the trustees, this sum to be held by them on the trusts of the settlement together with what remained due from the railway company, and ordering the trustees to convey to the company, the costs of all parties to be taxed and paid by the trustees out of the sums thus directed to be paid to them. From this order the plaintiff now appealed.

\* *Mr. Rolt, Mr. Elmsley, and Mr. Woolley*, for the plaintiff, \* 31 and in support of the appeal.— We contend that these lands were duly sold in exercise of the joint power contained in the deed of settlement, and that, accordingly, the money belongs to the plaintiff, as claimed by his bill; (a) and that there was, in equity, an execution of the power in the lifetime of Sir C. Morgan. The basis of the plaintiff's case is that there was a binding contract for sale, between Sir C. Morgan and the plaintiff on the one hand, and the railway company on the other, the price being to be ascertained either by arbitration or a jury, as mentioned in the letter of the 24th September, 1846.

[The Lord Justice KNIGHT BRUCE here referred to *Blundell v. Brettargh*, (b) and *Gourlay v. The Duke of Somerset*, (c) as to

(a) An unreported case of *Wright v. Wright*, which had been mentioned by the Vice-Chancellor on the hearing before his Honor, was here referred to by the appellant's counsel.

(b) 17 Ves. 232.

(c) 19 Ves. 429.



the effect which the circumstance of the arbitrators not having been appointed would have on the interference of the Court, in the case of a sale of property, the price of which was to be settled by arbitration.]

In the present instance, the question of who was to select which of the two modes of getting the value settled was to be adopted, was determined by the nature of the transaction: it was clearly the right of the vendors to do this, and no practical difficulty arises from the circumstance of the death of one of the parties. It is submitted also, that there has been a part performance, and therefore even treating it as a parol contract, the Court would enforce it, and if either party refused to take the necessary steps to complete it, by naming an arbitrator, &c., the Court would do it for him.

\* 32 *Gregory* \* v. *Mighell*, (a) *Morse* v. *Merest*. (b) It may be said, on the other side, that part performance cannot be alleged against the remainder-men in reference to the execution of the power, because there can be no fraud on the part of the remainder-men. The question, however, is not by whom fraud may be committed; but the company may say, that unless the execution of the power is upheld against the remainder-men, there will, as regards them, be a fraud by the donees of the power; and a parol agreement partly performed will bind a remainder-man. *Blore* v. *Sutton*, (c) *Dowell* v. *Dew*, (d) *Campbell* v. *Leach*. (e) Where the written instrument does not contain the full contract, but only affords evidence of what it was, part performance is a most material ingredient in the case. *Saunderson* v. *Jackson*. (g)

*Mr. Glasse* and *Mr. Milman* appeared for the trustees of the settlement and the parties entitled in remainder; and

*Mr. Osborne* was for the railway company; but they were not called on by the Court.

THE LORD CHANCELLOR. — The case has been very fully and ably argued; and I think we are so entirely in possession of all the bearings of it, that we need not call on the other side to be heard.

(a) 18 Ves. 328.

(b) 6 Madd. 26.

(c) 3 Mer. 237.

(d) 1 Y. & C. C. C. 345.

(e) Amb. 740.

(g) 2 Bos. & Pul. 233.

None of us have any doubt that the decision below was perfectly correct.

The equity here sought to be enforced is one by which the Court is called upon to aid the defective execution of a power against the parties entitled in default of that execution. It is unnecessary to say that that is a jurisdiction \* which the Court \* 33 does exercise in many cases which are well ascertained, and, amongst others, in favour of purchasers for value. There must, however, have been, in order to entitle the Court to interfere, an execution or an intended execution of the power, though defective. One question which is of great nicety and importance is this, whether in the case of a parol contract evidenced or at least supported by subsequent acts, but the only execution of which is to be deduced from the conduct of the parties, though the Court would interfere in favour of a purchaser against an owner in fee, it would also interfere against a party entitled in remainder. I do not think it necessary to give any distinct opinion upon that subject: indeed, if it had been necessary, I should have required further time to look into the authorities; but I must say, that merely looking at them in a cursory way according to my recollection, I think there is a great deal of force in the doubt (to put it no stronger) which has on several occasions been expressed upon the point, because when the principle upon which the Court interferes in such cases is considered, namely, that it would be a fraud on the part of the person who might insist upon the statute of frauds to insist upon it, I think it is extremely doubtful whether that principle is applicable to the case of enforcing such a parol contract against remainder-men. However, I do not think, for the reasons I will now proceed to state, that it is necessary to decide that point.

The ground upon which I proceed here is this, that there has been no contract at all proved, either written or parol: by no contract I mean no complete contract the terms of which had ever been ascertained. No doubt it had been ascertained that certain lands which the company wanted for the purpose of their railway, and all of \* which they were entitled to take, would be \* 34 wanted, and would be taken. All that remained, therefore, to be ascertained was that which alone had been left in doubt; namely, the sum of money to be paid for them. In order to ascertain that sum, presuming the lands themselves to be sufficiently

ascertained, we have to refer back to the original agreement, which states that the company within one month (that is, within a month after they first took possession) are to proceed without any delay to get the amount of compensation settled, either by arbitration or a jury as Sir Charles Morgan shall choose. Sir Charles Morgan, however, never made his election either for one or other of those modes of proceeding, and therefore it is quite clear that the only point remaining in doubt, namely, the amount of the purchase-money, never was ascertained by either of the modes which were pointed out. It has been suggested that that was immaterial; that the Court may ascertain it, or that some other step may be taken different from that which the parties stipulated as the mode of ascertaining what the amount of the purchase-money should be. I confess that upon principle, as well as upon authority, the Court cannot here, as it appears to me, take upon itself to do that: if, indeed, there had been an agreement that the price should be that which was to be ascertained upon a fair valuation, then the Court might interfere.

The cases of *Milnes v. Gery*, (a) *Blundell v. Brettargh*, (b) and *Gourlay v. The Duke of Somerset*, (c) enunciate the proposition in the strongest language, that where the parties have stipulated that the price shall be ascertained by arbitration, —

\* 35 in *Blundell v. Brettargh* \* it was by a particular arbitrator, in *Milnes v. Gery* it was not by a particular arbitrator but by arbitration generally,<sup>1</sup> — that in such case, if the arbitration does not proceed, and the price is not ascertained according to the mode in which the parties have stipulated, this Court has no right to make a different contract from that which the parties have entered into, and ascertain it for them in some different mode. That being so, it appears to me to put an end to this case, because the stipulation was that the price, putting it in the most favourable way for the plaintiff, should be ascertained by arbitration, the arbitrator being to proceed in a particular mode. The arbitrator was not named in the lifetime of one of the parties during whose lives the contract must have been enforced, and no steps were

(a) 14 Ves. 400.

(b) 17 Ves. 232.

(c) 19 Ves. 429.

<sup>1</sup> In *Richardson v. Smith*, L. R. 5 Ch. Ap. 651, Lord HATHERLEY, L. C., said the doctrine of *Milnes v. Gery* had “already been certainly carried quite far enough.”

taken to ascertain that, without ascertaining which no contract could be made available.<sup>1</sup>

There is another difficulty which strikes my mind (I do not know whether it strikes the other members of the court with equal force) as being extremely strong. The price was to be ascertained either by arbitration or by a jury, that is, by a jury under the Lands Clauses Consolidation Act: it was to be ascertained by contract, that is by arbitration, or by a proceeding *in invitum*, that is by a jury: the jury was the machinery which was in the hands and under the sole control of the company, and they might insist upon having the price thus ascertained, quite independent of the contract on the part of Sir Charles Morgan and his son. The agreement therefore came to this: The vendors say to the company, You shall have the land (that, however, was nothing, for the company were entitled to take the land, and had only to point out what part they wanted); if we can settle the price by contract or by arrangement, we will do so; if not, you must proceed by the \* mode in which the legislature has authorized you to \* 36 act. That being so, we are brought to a consideration which seems to me extremely important in this case; the purchasers here are not in the predicament which alone renders the interference of this Court important in aid of the defective execution of a power. The Court interferes because it is unjust on a purchaser not to give him the benefit of his contract, but here it is perfectly indifferent to the company whether the Court interferes or not. The company are certainly entitled to the land; they are certainly entitled to it by one of the alternative modes fixed for ascertaining the value, though not entitled to insist on the other mode. It therefore seems to me, even if there had been much more amounting to a contract than I can discover upon the face of the evidence of what took place, that we should be going considerably further than any case has gone, if we were to say that, under these circumstances, the parties who have the power of defeating those in remainder shall be allowed to do so, not for the benefit of the purchaser, but for the benefit of themselves, in contradiction to the interests of those whose rights the exercise of the power was to defeat.

I am of opinion, therefore, that the decision of Lord Justice

<sup>1</sup> See *Richardson v. Smith*, L. R. 5 Ch. Ap. 648.

TURNER, then Vice-Chancellor, was perfectly correct, and that this appeal must be dismissed.

THE LORD JUSTICE KNIGHT BRUCE. — It is essential to the success of the plaintiff on this appeal to show that a binding and enforceable contract — a contract, at least, in equity binding and in equity enforceable — was made between himself and his deceased father on one side, and the railway company on the other ; whether necessarily a written agreement I decline saying, for the evidence is very far from satisfying me that there was any contract, \* 37 except indeed a contract \* formed only by the railway acts, an exception which substantially for every present purpose is no exception at all.

As to a portion of the lands in question, neither was any price fixed, nor, according to my view of the evidence, was any mode of fixing it provided in any sense ; and with regard to the expression “ arbitration or a jury,” the present case falls far short of *Gregory v. Mighell*. (a) Had the railway company filed a bill during the late Sir C. MORGAN’s lifetime, against him and the present plaintiff for specific performance, and they had resisted a decree and required the bill to be dismissed, could a decree have been made against both on the footing of a contract either written or in part performed ? I am of opinion, certainly not ; for as I view the matter, it is wholly uncertain what the words “ arbitration or a jury ” meant. If they should be construed as explained by the railway acts, then it would have been in the power, I suppose, of the railway company, in case of default on the vendors’ part, to appoint an arbitrator for them. Did they intend this ? I conceive not. And what jury ? How to be obtained, or chosen, or appointed, or regulated ? The words are, I repeat, to my mind inexplicable. I am sorry to say that I think the decree right, and probably not alone upon the ground that I have mentioned, though I consider that ground sufficient.

THE LORD JUSTICE TURNER. — I have carefully reconsidered this case, and entirely concur in the judgment which has been given.

The appeal was accordingly dismissed without costs, except as to the railway company, whose costs were paid by the plaintiff.

\*BAILLIE v. JACKSON.

\* 38

1853. February 16. Before the Lord Chancellor Lord CRANWORTH and the LORDS JUSTICES.

The certificate of a deed as registered in a registry office in one of the colonies by the registrar, who was not "a person lawfully authorized to administer oaths," is not, *per se*, evidence of the fact of such registration under the 22d section of the Act 15 & 16 Vict. c. 86, but the signature of the registrar requires verification.

By the 22d section of the Act 15 & 16 Vict. c. 86, all pleas, answers, declarations, examinations, affidavits, &c., in causes or matters depending in the High Court of Chancery, shall and may be sworn and taken in Scotland or Ireland, or the Channel Islands, or in any colony, island, plantation, or place under the dominion of her Majesty, before any Judge, Court, notary public, or person lawfully authorized to administer oaths in such country, &c.; and the Court of Chancery is to take judicial notice of the seal or signature, as the case may be, of any such Court, Judge, &c., appended or subscribed to any such pleas, &c.

By the 14th section of the Act 14 & 15 Vict. c. 99, examined or certified copies of documents are made admissible in evidence in cases where the originals, on production from the proper custody, would be admissible.

The registrar of deeds in the island of St. Vincent, who had no authority to administer oaths, having certified that a deed had been registered in the proper office in that island, the question submitted for the decision of the full Court of Appeal was, whether such certificate was admissible without an affidavit of the handwriting of the registrar.

*Mr. Smythe* now applied that the document might be read without any proof of the signature.

The Lord Chancellor observed, that the Court could only take judicial notice of the seal or signature of such \*persons \*39 as were, according to the definition in the 22d section of the Act 15 & 16 Vict. c. 86, "lawfully authorized to administer oaths," and it being admitted that the registrar in the present case had no

such authority, the proof of the signature could not be dispensed with; and that the 14th section of the Law of Evidence Amendment Act (14 & 15 Vict. c. 99) only applied to copies of documents, while the question before the Court had reference to an original instrument.

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BATEMAN v. COOK.

1853. February 16. Before the Lord Chancellor Lord CRANWORTH and the LORDS JUSTICES.

Affidavits taken in the colonies previously to the passing of the Act 15 & 16 Vict. c. 86, in the presence of a person lawfully authorized to administer oaths, are receivable in this country under the 22d section of that Act, without verification of the signature of the person before whom they have been taken.<sup>1</sup>

IN this case an application was made to the full Court of Appeal, by the direction of the Lords Justices, to determine whether the 22d section of the Act 15 & 16 Vict. c. 86, was retrospective in its operation. It appeared that affidavits in the suit were sworn at Bathurst in Australia previously to the passing of the above Act, and the question was, whether the verification of the commissioner's signature might be dispensed with.

The matter being mentioned to the Vice-Chancellor KINDERSLEY, his Honor was of opinion that the Act was not retrospective.

*Mr. Elderton*, in support of the application.

The Lord Chancellor expressed the opinion of the Court to the effect that the affidavits were receivable, whether taken before or after the passing of the Act, without proof of the commissioner's signature.

<sup>1</sup> See 1 Dan. Ch. Pr. (4th Am. ed.) 744, 745.

\* EDWARDS v. TUCK.<sup>1</sup>

\* 40

1853. July 20, 27, 30. Before the Lord Chancellor Lord CRANWORTH and the LORDS JUSTICES.

W. C. devised and bequeathed all his real and personal estates to trustees, upon trust, as to certain parts thereof, to pay the rents and profits to his granddaughter F. E. for life, and after her death to sell the same and divide the proceeds among her children on their respectively attaining twenty-one, with remainder to the children of his nephew C. W. C. in like manner as he had bequeathed unto them the moiety of the residue of his estate and effects: the testator then empowered his trustees to sell and convert into money the residue of his real and personal estate; and, subject to the payment of his debts and legacies, he directed them to invest the proceeds and accumulate the income, and to divide the principal and accumulation into two equal parts, and to pay or transfer one of such parts unto and amongst the children of his granddaughter F. E., and the remaining part among the children of his nephew C. W. C.: and the testator directed that the share of each child of F. E. and C. W. C. respectively should be a vested interest, as to sons at twenty-one or earlier death leaving issue, and as to daughters at twenty-one or marriage; and that if any such child died without having attained a vested interest, the share of such child should accrue to the survivors of the said children; and that if there should not be any child of C. W. C. and of F. E. or of either of them, or, being such, if all such children should die without having attained any vested interest, the trust property should be held in trust for the testator's heir and next of kin according to the natures thereof: the testator died in 1826; and in 1847 the granddaughter, F. E., having never been married, and being between fifty and sixty years of age, instituted a suit for the opinion of the Court as to the disposition of the accumulation of the moiety of the residue left to her children. *Held*, that the direction for accumulation was void beyond the period of twenty-one years from the testator's death, and that the subsequent accumulations were undisposed of by the will, and went, according to the nature of the property, to the testator's heir-at-law and next of kin.<sup>2</sup>

*Held*, also, that a direction to accumulate residue for the benefit of an infant is not a provision for raising a portion for that child within the meaning of the second section of the Thellusson Act.<sup>3</sup>

*Held*, per L. J. TURNER, that the accruer clauses in the trusts of the residue

<sup>1</sup> S. C., 23 Beav. 268.

<sup>2</sup> See *Lewin Trusts* (5th Eng. ed.), 74, 75, 76, 687; *Nettleton v. Stephenson*, 3 De G. & Sm. 386; *Re Drakeley's Trust*, 19 Beav. 395; *Green v. Gascoyne*, 11 Jur. N. S. 145; *Smith v. Lomas*, 10 Jur. N. S. 743; *Sewell v. Denny*, 10 Beav. 315; *Re Chelow's Trust*, 1 Johns. & H. 639; *Combe v. Hughes*, 34 Beav. 127; 2 De G., J. & Sm. 657; *Mathews v. Keble*, L. R. 4 Eq. 467; S. C. L. R. 3 Ch. Ap. 691.

<sup>3</sup> See *Mathews v. Keble*, L. R. 3 Ch. Ap. 691; *Drewett v. Pollard*, 27 Beav.



must be construed distributively, and could only operate between members of the same family, so that, on the death of F. E. without being married, the moiety limited upon trusts for her children would devolve upon the testator's heir and next of kin, and not upon the children of C. W. C.

*Held*, also, per L. J. TURNER, that in this view the question as to the construction of the statute was immaterial, for that, if the statute applied, as the income could not abide the event of F. E. having or not having a child, but must be received according to the statute by the person who would be entitled, if there was no trust for accumulation, the heir-at-law and next of kin would take; and if the statute did not apply, they took under the will a vested interest in the accumulations, subject only to be divested upon an event which (having regard to the age of F. E.) was impossible; and so in either case were entitled to present payment.

The decision of Lord St. LEONARDS in *Barrington v. Liddell*, 2 De G., M. & G. 480, remarked upon (and approved of by the Lord Chancellor).

WILLIAM CHAPMAN, by his will, dated the 21st October, 1826, after directing the payment of his debts and funeral expenses and the charges of proving his will, and after giving unto his granddaughter Frances Edwards and other persons certain specific

\* 41 legacies, \* gave, devised, and bequeathed unto George Priest,

William Tuck, and George Yeatherd, their heirs, executors, administrators, and assigns, certain freehold, copyhold, and leasehold premises specifically described, certain furniture, books, and pictures which he desired should go as heirlooms, a share in the Strout Water Navigation, and four shares in the Auction Mart, and also all moneys standing in his name in the public funds, moneys due upon securities or otherwise, rents and dividends which should be due or accruing due at the time of his decease, and all the rest, residue, and remainder of his estate and effects, both real and personal, or of what nature or kind soever and where-soever the same might be and not otherwise specifically disposed of by his will, and all his estate and interest therein with all and every the rights, members, and appurtenances thereto belonging, to hold the same upon the trusts, and for the intents and purposes, and with, under, and subject to the powers, provisos, declarations, and agreements thereafter expressed and contained of and concerning the same, upon trust, as to a certain dwelling-house and

196; *Burt v. Sturt*, 10 Hare, 415; *Barrington v. Liddell*, 2 De G., M. & G. 480 and notes and cases; *Lewin Trusts* (5th Eng. ed.), 75, 76; *Wildes v. Davies*, 1 Sm. & Gif. 475; *Watt v. Wood*, 2 Drew. & Sm. 56; 1 *Jarman Wills* (3d Eng. ed.), 287 *et seq.*; *Middleton v. Losh*, 1 Sm. & Gif. 61.

premises and cottage therein described, to let the same either from year to year or for a term of years, or in case they should not be able to let the same to their satisfaction within twelve months after his decease, then to proceed to sell the same, and as to and concerning his freehold messuage or tenement at Stratford, his freehold \* messuage or tenement in Fenchurch \* 42 Street, and his copyhold messuage or tenement and premises at Paradise Row Snarebrook, upon trust from time to time during the life of his said granddaughter Frances Edwards, to let the same for such term of years at such yearly rents and in such way as they should from time to time think proper, and pay the rents, issues, and profits unto his said granddaughter for her separate use for her life, and from and after her decease then upon further trust to sell and dispose of the said three messuages, and to divide the proceeds arising from such sale equally between and amongst all and every the child or children of his said granddaughter if more than one in equal shares as tenants in common upon their respectively attaining the age of twenty-one years, and if only one then to pay the whole to such one, his or her executors, administrators, or assigns, and in case there should not be any child or children of his said granddaughter, or being such if all such children should die without having attained a vested interest therein, then the testator directed that the trustees should stand possessed thereof upon trust for the benefit of the child or children of his said nephew Charles William Chapman in like manner as he had thereafter bequeathed unto them a moiety of the residue of his estate and effects, and as to and concerning all other his freehold, copyhold, and leasehold estates thereinbefore devised and bequeathed, not including his said three last-mentioned messuages or tenements nor the dwelling-house and premises and cottage before mentioned, upon trust that his trustees should from time to time and at all times thereafter let the same either from year to year or for a term of years or at their discretion sell the same, and as to and concerning all and every his personal estate and effects upon trust that the trustees should get in the same and convert the same into \* money, except the furniture, &c., before directed to be \* 43 held and enjoyed as heirlooms. And the testator directed that his trustees should out of the first moneys which should be received in respect of the premises retain to and satisfy themselves all costs, charges, and expenses attending the execution of his will,

and stand possessed of the rents of his freehold, copyhold, and leasehold estates, except of those before specifically bequeathed, and of the moneys to be raised from the sale of such parts as should be sold, and all his personal estate and effects and the produce and profits thereof, after the payment of such costs, charges, and expenses as aforesaid, upon trust in the first place to pay, satisfy, and discharge all his funeral and testamentary expenses and just debts, and in the next place to pay and transfer as therein mentioned the several legacies and sums of money and stock which the testator then proceeded to bequeath, among which were a legacy of 2000*l.* to his said granddaughter Frances Edwards and a legacy of 500*l.* to his said nephew Charles William Chapman, and in the next place by and out of the said trust moneys and premises to set apart and invest in their joint names a sufficient sum of 3*l.* per cent bank annuities to raise and produce the clear yearly sum of 200*l.*, to be paid to the testator's brother Charles Chapman for his life, and on his death to his wife, Mary Chapman, in case she should survive him for life, and after the decease of the survivor of them the said Charles Chapman and Mary his wife, then as to the principal bank annuities so to be set apart and invested for the purpose of raising the said yearly sum of 200*l.*, in trust for all and every the child and children of the testator's nephew Charles William Chapman as should be living at the time of the decease of the survivor of them the said Charles

Chapman and Mary his wife if more than one in equal  
 \* 44 shares, and if but one then for such only \* child, the share  
 of such child who should be a son to be paid or transferred  
 to him at his age of twenty-one years or to his executors or administrators if he should die under the age of twenty-one years leaving issue, and the share of such child being a daughter to be paid and transferred to her at the age of twenty-one years or on the day of her marriage, whichever should first happen, in case such ages or days should not arrive in the lifetime of them the said Charles Chapman and Mary his wife or either of them, but if such ages or days should arrive in the lifetime of them or either of them, as soon as conveniently might be after the decease of the survivor of them, with the interest, dividends, and produce thereof from the time of such decease. And the testator declared, that all and every the share and shares provided for the said children of the said C. W. Chapman respectively should be considered as vested interests in such

of them who being a son or sons should live to attain the age of twenty-one years or die before that age leaving issue, and being a daughter should live to attain that age or be married. And the testator further declared that if any such the child or children of the said C. W. Chapman should depart this life without having attained a vested interest in his or her share of the said bank annuities, the share of every such child so dying should accrue and belong unto the survivors or survivor of the said children if more than one in equal shares, and should become vested and be paid or transferred at such ages or times and in such manner as was before directed concerning his, her, or their original share and shares respectively, and that all and every the share and shares which should thus accrue to any such surviving child, in case any such surviving child should afterwards depart this life without having attained a vested interest in his or her accruing share or shares should from time to time be subject to such and \* the like right of ac- \* 45  
cruer or survivorship unto and for the benefit of the survivors or survivor of the said children as was declared concerning the original share and shares of such child or children so dying as aforesaid. And the testator further declared, that if there should not be any child or children of the said Charles William Chapman living at the time of the decease of the survivor of them the said Charles Chapman and Mary his wife, or being such if no such child should live to attain a vested interest in the said bank annuities, then and in such case the said bank annuities so to be set apart and invested or so much thereof as should not have been applied or disposed of for the purposes aforesaid should from and immediately after the decease of the survivor of them the said Charles Chapman and Mary his wife sink into and become part of his residuary estate and effects thereafter disposed of.

And the testator then proceeded as follows: "And as to and concerning the residue or surplus of the rents, issues, and profits of my said freehold, copyhold, and leasehold estates, and of the moneys to arise from the sale of such parts thereof as shall be sold as aforesaid, and of my said personal estate and effects, and the produce thereof from time to time remaining over and above what shall be sufficient to answer the several purposes aforesaid, I will that they my said trustees and the survivors and survivor of them and the heirs, executors, and administrators of such survivor do and shall from time to time permit and suffer the same to accumu-

late for the benefit of the several persons to and in trust for whom the said estates and premises are hereinafter devised and bequeathed, and do and shall for that purpose lay out and invest the same from time to time as and when the same shall be received in the joint names of them the said trustees and of

\* 46 the survivors and survivor of them \* and of the executors or administrators of such survivor in some of the public stocks

or funds, or in government or real securities in England, and do and shall from time to time receive and take the dividends, interest, and annual profits thereof, and again place out and invest the same in such or the like stocks, funds, and securities, and so from time to time, as occasion shall be or require, until the period of distribution hereinafter mentioned and expressed, and with full power for them my said trustees and the survivors and survivor of them and the heirs, executors, and administrators of such survivor from time to time, and when and as they think proper to call in, alter, and vary any of the stocks, funds, or securities, in or upon which my said estate and effects or the produce thereof or any part or parts thereof are or shall or may be at any time invested. And, subject to the several trusts aforesaid, I will and direct that they my said trustees, and the survivors and survivor of them, and the heirs, executors, and administrators of such survivor, shall stand seised and possessed of and interested in all and every my said freehold, copyhold, or leasehold estates hereinbefore devised and bequeathed, or intended so to be, and of and in the moneys to arise and be received from the sale of such parts thereof as shall be sold under the aforesaid trusts, and of and in my said personal estate and effects, and the produce thereof, and of and in all accumulations of my said real and personal estate and effects, and the rents, issues, dividends, and profits thereof, and all other my estate and effects whatsoever, the whole of which I direct shall for the purpose of distribution be considered as personal estate, in trust to divide the same into two equal half parts or shares, and to pay or transfer one of such half parts or shares unto and amongst all and every the child or children of my said granddaughter Frances Edwards and their

\* 47 respective executors, administrators, \* and assigns in equal shares and proportions as tenants in common, and if but one, the whole to such one, his or her executors, administrators, or assigns, and also to pay or transfer the remaining half part or share thereof unto and amongst all and every the child or children

of my said nephew Charles W. Chapman and their respective executors, administrators, and assigns in equal shares as tenants in common, and if but one the whole to such one, his or her executors, administrators, and assigns, the share of each child of my said granddaughter and of my said nephew who shall be a son to be conveyed, paid, or transferred to him at his age of twenty-one years or to his heirs, executors, or administrators, if he shall die under the age of twenty-one years leaving issue, and the share of each child being a daughter to be conveyed, paid, and transferred to her at her age of twenty-one years or on the day of her marriage, whichever should first happen, in case such ages or days shall not arrive in my lifetime, but if such ages or days shall arrive in my lifetime, then as soon as conveniently may be after my decease, with the accumulated rents, interests, dividends, and profits thereof from the time of my decease. And I do hereby declare that all and every the share and shares hereinbefore by me provided for the said children of my nephew Charles W. Chapman and of my said granddaughter, Frances Edwards, respectively, shall be considered as vested interests in such of them who being a son or sons shall live to attain the age of twenty-one years, or die before that age leaving issue, and being a daughter or daughters shall live to attain that age or be married. And I do hereby further declare, that if any such child or children shall depart this life, without having attained a vested interest in his or her share of the said trust estate and premises, the share of each such child so dying shall accrue and belong unto the survivors or survivor of the said children and the heirs, executors,

\* and administrators of such survivors, if more than one, in \* 48 equal shares, and shall become vested, and be conveyed, paid, and transferred at such ages or times, and in such manner as is hereinbefore directed concerning his, her, or their original share or shares respectively: and also that all and every the share or shares which by virtue of this proviso shall accrue to any such surviving child, in case any such surviving child shall depart this life without having attained a vested interest in his or her accruing share or shares, shall from time to time be subject to such and the like right of accruer or survivorship, unto or for the benefit of the survivors or survivor of the said children, as hereinbefore is declared concerning the original share and shares of such child or children so dying as aforesaid. And I do hereby further direct

and declare, that in case there shall not be any children or child of the said C. W. Chapman, and of my said granddaughter Frances Edwards, or of either of them, or being such if all such children shall depart this life without having attained any vested estate and interest in my said trust estate and premises, or any part thereof, then, and in such case, they my said trustees and the survivors and survivor of them, and the heirs, executors, and administrators of such survivor, shall stand seised and possessed of and interested in my said real and personal estate and effects, or so much thereof as shall not have been applied for the purposes aforesaid, in trust for my own right heirs and next of kin according to the respective natures and qualities thereof, and to and for and upon no other trust, intent, and purpose whatsoever."

And the will contained a power for the appointment of new trustees, and a declaration as to the indemnity of the trustees, and their reimbursing to themselves their costs, charges, and expenses; and the testator nominated and appointed G. Priest, W. Tuck, and G. Yeatherd executors of his will.

\* 49     \* The testator died on the 19th November, 1826. Charles William Chapman, the testator's nephew, died on the 10th September, 1836, leaving four children, three of whom were born in the testator's lifetime, and one within five months after his death; and as to the shares of these in the property under the will no question was now made. Frances Edwards, the granddaughter, never married; and the present suit was instituted to obtain the opinion of the Court on the construction to be put on the dispositions contained in the will in favour of her children.

The bill was filed in October, 1847, by Frances Edwards, who was then between fifty and sixty years of age, as plaintiff, and to it the trustees of the will, C. T. Edwards, who was the testator's grandson and heir-at-law and customary heir, T. Edwards (he together with the plaintiff and C. T. Edwards being the next of kin of the testator), and the children of C. W. Chapman were made defendants; and it raised the point, whether the trust for accumulation relating to the rents, &c., of the moiety of the freehold, copyhold, and leasehold estate, and the residuary personal estate, and the produce thereof, devised and bequeathed for the benefit of the children of the plaintiff, was not void, so far as such period of accumulation exceeded twenty-one years from the testator's death, namely, the 19th November, 1847; and whether the

rents, &c., from the said moiety, and from the legal accumulations thereof from the expiration of the said twenty-one years until the moiety was disposed of by the will did not belong as to personalty to the plaintiff and C. T. Edwards and T. Edwards as next of kin of the testator, and as to realty to C. T. Edwards as heir-at-law.

The cause was heard in May, 1849, when certain inquiries were directed. The Master made his report \* on the 12th \* 50 August, 1852, finding, among other things, the various facts as to the state of the testator's family above mentioned.

On the 10th March, 1853, the cause came on upon further directions before the Master of the Rolls, when his Honor made a decree, declaring that the trusts for accumulation of or relating to the residue or surplus of the rents, issues, and profits of the moiety of the freehold, copyhold, and leasehold estates, and the residuary personal estate of the testator, and the produce thereof, respectively devised and bequeathed unto or for the benefit of the child or children of the plaintiff Frances Edwards were void, so far as the period of accumulation directed by the will exceeded the term of twenty-one years from the testator's death, and that such trusts for accumulation accordingly ceased in the month of December, 1847; and declaring that the rents, issues, profits, and income, which had arisen or might arise from the said moiety, and from the legal accumulations thereof, from and after the expiration of the said term of twenty-one years until the said moiety should become actually vested, were undisposed of by the will, and that the same, so far as they had arisen or might arise from the testator's personal estate and from the legal accumulations thereof, belonged to and were divisible between the plaintiff and C. T. Edwards and T. Edwards as the next of kin of the testator in equal shares and proportions, and that the same, so far as they had arisen or might arise from the testator's freehold and copyhold estates and from the legal accumulations thereof, belonged to C. T. Edwards as the heir-at-law and customary heir of the testator. In delivering judgment, his Honor remarked that the two cases of *Barrington v. Liddell* (a) and *Middleton v. Losh* (b) produced considerable \* embarrassment in his mind, because he thought it \* 51 impossible to reconcile those two cases with some of the cases cited in them and a number of other cases to be found in

(a) Since reported 2 De G., M. & G. 480.      (b) 17 Jur. 175.



the books. His Honor concluded by saying, "I propose to adhere to the decisions as they existed prior to the decision of *Barrington v. Liddell*, and at the same time that I express my opinion I have a strong desire and wish that the matter should be carried further, and that, if possible, the opinions of both the Lord Chancellor and the Judges of the Court of Appeal should be obtained, for the purpose of settling the question, which, as is evident from all the previous authorities, it had been considered to be up to the time of the last case, but which that case decidedly unsettled. I am of opinion that in this case the statute applies, and that there has been a void accumulation, void for excess, with respect to one half of the property."

The children of C. W. Chapman now appealed from the decision of the Master of the Rolls, and the case was directed to be heard before the full Court of Appeal.

*Mr. R. Palmer* and *Mr. Surrage*, for the appellants.—They submitted, generally, whether upon the construction of the will, the case was one really obnoxious to the Thellusson Act; but admitting it to be so, they insisted that it was within the terms of the exception contained in the second section. They contended that the provision made for the children of Mrs. Edwards was a portion for the children of a person taking an interest under the devise; that the word "portion" conveyed the ideas of provision and distribution; that it was impossible to distinguish the present case from that of *Barrington v. Liddell*, (a) and that consequently the accumulation must be held to be legal. They referred to and commented on the cases of *Eyre v. Marsden*, (b) *Halford v. Stains*, (c) *Bourne v. Buckton*, (d), *Beech v. Lord St. Vincent*, (e) *Jones v. Maggs*, (g) *Morgan v. Morgan*, (h) *Middleton v. Losh*, (i) *Shaw v. Rhodes*, (k) S. C. on appeal *sub nomine Evans v. Hellier*. (l) They submitted further, that if the accumulation in question was to be held void, the children of C. W. Chapman would, on the true construction of the will, become entitled.

(a) 2 De G., M. & G. 480.

(b) 2 Keen, 564.

(c) 16 Sim. 488.

(d) 20 Law J. Ch. 109: since reported, 4 De G. & S. 164.

(e) 17 Jur. 175; 22 Law J. Ch. 422.

(k) 1 M. & C. 135.

(d) 2 Sim. N. S. 91.

(e) 3 De G. & S. 678.

(g) 9 Hare, 605.

(l) 5 Cl. & Fin. 114.

*Mr. Stevens* appeared for the trustees of the will, but took no part in the argument.

*Mr. Roupell* and *Mr. Sheffield*, for the plaintiff, supported the decision of the Master of the Rolls. — They submitted, first, that the present was not the case of a portion within the meaning of the exception; and secondly, that assuming the accumulation to be void, the heir-at-law and next of kin were entitled from the expiration of the twenty-one years. On the first point, they drew attention to the fact that the gift in question was a share of the general residue, and that the parent *Mrs. Edwards* took no interest in it, the bequest made to her in the will being specific and quite distinct from that of the residue. They urged that the exceptions in the second section of the statute must be construed strictly, and not in such a way as to abrogate indirectly all the prohibitions contained in the first section; that though it might not be easy to define \*exactly the \* 53 meaning of the word “portion,” yet that there was a technical sense attaching to it, which might be gathered from such cases as *Freemantle v. Bankes*, (a) *Trimmer v. Bayne*, (b) *Ex parte Pye*, (c) *Wetherby v. Dixon*, (d) *Monck v. Lord Monck*, (e) and *Pym v. Lockyer*, (g) and that the legislature could not be considered as using the word in any manner inconsistent with that technical signification; that whether a gift by will was to be treated as a portion must depend on the nature of the gift itself, and that a mere provision for a person did not, apart from other circumstances, constitute a portion. They contended that the gift of a general residue did not fall within any meaning which could attach to the term portion, and, if so, that the exception in the second section of the Act did not apply to the present case; and they referred to the word “raising” used in the section as helping this view, the term being inapplicable to the gift of a share of the corpus of property, but naturally applying to the creation of a fund by the process of accumulation. They then commented on the cases of *Eyre v. Marsden*, (h) *Shaw v. Rhodes*, (i) *S. C.* on appeal *sub nomine Evans v. Hellier*, (k) *Halford v. Stains*, (l)

(a) 5 Ves. 79.

(b) 7 Ves. 508.

(c) 18 Ves. 140.

(d) 19 Ves. 407.

(e) 1 Ball &amp; Beat. 298.

(g) 5 M. &amp; C. 29.

(h) 2 Keen, 564.

(i) 1 M. &amp; C. 135.

(k) 5 Cl. &amp; Fin. 114.

(l) 16 Sim. 488.

*Beech v. Lord St. Vincent*, (a) *Morgan v. Morgan*, (b) *Bourne v. Buckton*, (c) and *Jones v. Maggs*, (d) as showing the meaning of the word portion, and remarked that in *Barrington v. Liddell*, (e) there was no doubt as to the gift in question being a portion, and that therefore that case, as well as *Middleton v. Losh*, (g) \* 54 \* which followed it, was not in conflict with the previous decisions. They also mentioned *Turner v. Frederick*, (h) *Elborne v. Goode*, (i) *Wildes v. Davies*, (k) and the case of *Burt v. Sturt*, (l) before the Vice-Chancellor Sir W. PAGE WOOD, from whose judgment in which they read passages stating the facts of, and explaining the decision in, *Barrington v. Liddell*.

On the second point, namely, the right of the heir and next of kin to the accumulations after the twenty-one years, assuming the direction in question to be void subsequently to that period, they cited *Griffiths v. Vere*, (m) *Longdon v. Simson*, (n) *Eyre v. Marsden*, (o) *Ellis v. Maxwell*, (p) *Skrymsher v. Northcote*. (q)

[The Lord Justice KNIGHT BRUCE referred to *M'Donald v. Bryce*. (r)]

*Mr. G. Simpson* appeared for the heir-at-law, and supported the decree appealed from.

*Mr. R. Palmer* replied.—He denied the applicability to the construction of the Thellusson Act of the cases cited on the other side as to the meaning of the word “portion,” observing, that they all related to the doctrine of satisfaction of a portion by a legacy and to double portions. He cited Jacob’s Law Dictionary, as showing that the natural sense of the word portion was a part of \* 55 something to be divided \* belonging to a person entitled to share, and he contended that there was no reason for holding that the statute intended to use the word in a more restricted and

(a) 3 De G. & S. 678.

(b) 20 Law J. Ch. 109: since reported, 4 De G. & S. 164.

(c) 2 Sim. N. S. 91.

(l) Since reported, 17 Jur. 728.

(d) 9 Hare, 605.

(m) 9 Ves. 127.

(e) 2 De G., M. & G. 480.

(n) 12 Ves. 295.

(g) 17 Jur. 175.

(o) 2 Keen, 564.

(h) 5 Sim. 466.

(p) 3 Beav. 587.

(i) 14 Sim. 165.

(q) 1 Swanst. 566.

(k) 22 Law J. Ch. 495.

(r) 2 Keen, 276.

technical sense. He referred to *Powys v. Mansfield*, (a) as illustrating the intention of the statute, in requiring the testator to give an interest to the parent of the children for whom portions were directed to be raised.

THE LORD CHANCELLOR. — This is a case of very great difficulty, arising out of what is unfortunately the loose way in which the legislature has been in the habit of expressing its will (a reproach which I am afraid has not become less in modern times), for nothing can be less creditable than the mode in which the Act in question, commonly called Lord Loughborough's Act, was drawn up. I will now, however, state the conclusion to which I have arrived upon the case before the Court.

The testator by his will gives certain real estate for the benefit of his granddaughter Frances Edwards for life, then for her children, with remainder over to the children of his nephew C. W. Chapman in the same way as he had given to them a share of his residuary estate: he then gives an annuity of 200*l.* to his nephew, and bequeaths other legacies. He then, after directing that as to the annuity, if there should be no children of C. W. Chapman, it should form part of and sink into the residue, disposes of his residuary estate in the following manner: "And as to and concerning all the residue or surplus of the rents, issues, and profits of my said freehold, copyhold, and leasehold estates, &c. [His Lordship here read the passages from the will above set out.]

\*The testator died in the year 1826, at which time his \* 56 granddaughter was a lady of twenty-five or thirty years of age, and his nephew a married man. The nephew had several children, and as to their shares in the testator's property no question is now raised: the present discussion relates only to that portion left to the children of the plaintiff Miss Edwards. Twenty-one years of the accumulation ended in 1847, and the plaintiff having never been married, and being now at a period of life when it may be said to be impossible that she can have children, the question arises as to what is to be done with the moiety of the residue that has been accumulated.

Under the first clause of the Thellusson Act, the direction is that no person shall, after the passing of the Act, "by any deed or

(a) 3 M. & C. 359.

deeds, surrender or surrenders, will, codicil, or otherwise howsoever, settle or dispose of any real or personal property so and in such manner that the rents, issues, profits, or produce thereof shall be wholly or partially accumulated for any longer term than the life or lives of any such grantor or grantors, settlor or settlors" (we have nothing to do with that), "or the term of twenty-one years from the death of any such grantor, settlor, devisor, or testator." If the Act had ended here it is quite clear that the accumulation could only have been directed up to the year 1847, being twenty-one years from the death of this testator; but then comes the second section, which creates the embarrassment in which Courts of justice have more than once felt themselves placed: "Provided always, and be it enacted, that nothing in this Act contained shall extend to any provision for payment of debts" (that we have nothing to do with), "or to any provision for raising portions for any child or children of any grantor, settlor, or \* 57 devisor, or any child \* or children of any person taking any interest under such conveyance, settlement, or devise."

The question thus is, whether the present direction is a provision for raising portions for the children of any person taking an interest under this devise. It is a provision for the benefit of the possible children of the testator's granddaughter Frances Edwards, and the nature of the provision is that it is to accumulate during her life till those possible children attain twenty-one. Is that a provision for raising portions for the children of a person taking an interest under the devise?

Two objections are made: it is said, first, that this is not a direction for raising portions at all, and that it is an abuse of language to speak of a general gift of all a person's property to accumulate until a possible child attains twenty-one, as a provision for raising a portion for that child; and secondly, that it is not a provision for raising portions for a child of a person taking an interest under that devise, for although Miss Edwards, who would have been the mother if there had been children, did take an interest under the devise, it was an interest not in the property directed to be accumulated but in another estate.

The first question, then, is, how this matter stands independently of authority. I own that, independently of authority, I should say that it is impossible to treat such a direction as this as a direction for raising portions for children. If I am asked to define what the

raising of portions is, I confess myself in extreme embarrassment and difficulty, which I cannot at present surmount. It is, however, sometimes possible to say what a thing is not, although it may be extremely difficult to define what that thing is. Thus, whether under \* any circumstances the gift of a residue should \* 58 be called giving a portion I am not now required to decide ; but I think that a direction to accumulate all a person's property to be handed over to some child or children when they attain twenty-one can never be said to be a direction for raising portions for the child or children ; it is not raising a portion at all, it is giving every thing. "Portion" ordinarily means, as has been observed during the argument, merely a part or a share, and though I do not know that the gift of a whole might not, in some circumstances, come under the term of a gift of a portion, yet I do not think it comes within the meaning of a portion in this clause of the Act, which points to the raising of something out of something else for the benefit of some children or class of children. This is the way in which the matter strikes me ; and although I confess that it certainly is not entirely satisfactory to my mind, being merely a negative definition, it is sufficiently satisfactory to enable me to act on the present occasion, and I accordingly do not think that a gift of a residue to accumulate is a provision for the raising of portions within the meaning of the second section of the Act. In truth, if it were so, the whole Act would fall to the ground at once. It has indeed been often remarked, that the Act is very easily evaded ; but if every direction for accumulation for a child was a portion, the intention of the legislature, which was to prevent accumulations, such accumulations being most frequently directed for the benefit of children, would be entirely defeated. There is certainly the other safeguard which the clause imposes ; namely, that the children in whose favour the accumulation may possibly be made are the children of some person taking an interest under the will ; but applying to this the argument which has been used, that it is confined to the case of the children of a person taking an interest in the same property, it is \* clear that \* 59 where residue is directed to accumulate, if the parents take an interest in any thing, they take an interest in the same property in the only possible sense that could be attributed to the words, because what is directed to be accumulated is all except the interest given to the parent. I think, therefore, that whether the proposition

be right that the parents must take an interest in the same property, or whether it be sufficient that they take an interest in any property, that question does not arise in a case where the accumulated fund is a residue, because of necessity if the parents take any interest they take an interest in what must be considered the same property as that which is the subject-matter of accumulation. I cannot, then, come to any other conclusion than this, that a direction to accumulate residue for the benefit of an infant is not a provision for raising portions for the child within the meaning of the section in question. That was the view that was taken of this statute by Sir RICHARD KINDERSLEY in the case of *Bourne v. Buckton*, (a) and I entirely concur in the observations there made by his Honor, which seem to me to be well founded.

It is, however, said, that in holding the present case not to be within the section of the Act, we are militating against the high authority of my very learned predecessor, Lord St. LEONARDS, who is supposed to have decided the contrary in *Barrington v. Liddell* (b), and I observe, that in giving judgment, the Master of the Rolls is represented to have said that he felt himself under the necessity of deciding either against *Barrington v. Liddell* or against a long series of authorities in a contrary direction, and observations are attributed to his Honor to the effect, that when a \* 60 course of decisions has \* long prevailed, it is infinitely better to adhere to them than to consider whether they were right in the first instance. I do not, however, quite go along with his Honor in that, for I do not see the long series of authorities that, if I had thought that *Barrington v. Liddell* was a decisive authority on the subject, would have made it difficult for me to follow it. Independently of that, I think that *Barrington v. Liddell* was a perfectly right decision; but the present case, in the view which I take of it, does not come within the same class.

As to *Barrington v. Liddell*, I will not speak with great confidence, knowing the difference of opinion which existed on it, the Lord Justice TURNER having taken one view of the case, and my Lord St. LEONARDS having taken another. I think, however, not only that Lord St. LEONARDS ought to be an authority where he has, on appeal, decided a contrary way to the Court below, but that his view of the case is likely to be the more accurate, even if I were

(a) 2 Sim. N. S. 91.

(b) 2 De G., M. & G. 480.

not to look at it as the decision of the superior Court. The facts in that case were these: there was an estate settled to the use (omitting the preceding uses) of the present Lord Barrington for life; with remainder to his first and other sons, and with a proviso for raising portions to an amount varying according to the number of his younger children, but which, there being a large family, turned out to be 40,000*l.*: soon after the marriage of Lord Barrington, when it was uncertain what the number of children would be, the late Bishop of Durham, his great-uncle, made his will, and by that will provided for increasing the value of the settled estate by building a mansion upon it, the sum left for that purpose being 30,000*l.*; he then directed his executors to set apart a sum of 15,000*l.*: and to accumulate that sum for the purpose of raising the sum that should eventually \* become payable for \* 61 portions under the settlement. (a) What Lord ST. LEONARDS

(a) Lord ST. LEONARDS, in his judgment in *Barrington v. Liddell*, 2 De G., M. & G. 480, 491, thus states the other provisions of the Bishop's will, besides that on which the main question in the case arose: "The Bishop of Durham, having no power over the settled estates, but meaning greatly to benefit his family, made by his will large provisions for his nephew and grandnephew, the late and present Lord, and, amongst other things, gave chattels of considerable value as heirlooms to go with the settled estates, and directed a sum of 30,000*l.* to be laid out in the erection of a mansion-house upon the settled estates."

The following is an outline of those parts of the Bishop's will on which the above statement is founded; the special case contained no more of the will than is set out in the report:—

The testator devised certain estates at Bedlington (these were not the settled estates) to trustees, to the use of his great-nephew the Honourable W. K. Barrington, eldest son of George Viscount Barrington, for life, with remainder to trustees to preserve, with remainder to the first, second, and other sons of W. K. Barrington in tail male, with remainder to the second and other sons of George Viscount Barrington successively for life, with remainder to their first and other sons respectively in tail male, with remainder to George Viscount Barrington in fee. He then devised his house in Cavendish Square to trustees, upon trust for George Viscount Barrington for life, and after his death for the person for the time being entitled to the Bedlington estates; and devised other estates in Oxfordshire to trustees to the use of his great-nephew Uvedale Price for life, with remainder to his first and other sons in tail, with remainder to the use of the trustees upon trust to sell and apply the proceeds in the purchase of lands in Berkshire to be settled to the same uses as the Bedlington estates. He then bequeathed certain pictures and china, part immediately and part after the death of Miss Colberg, to the trustees for the time being for preserving contingent remainders in the settled estates, in trust to permit the same to be held and enjoyed as heirlooms



decided was, that in the first place that was a provision made  
 \* 62 by the devisor for the \* benefit of the children of a parent  
 who took an interest, and that it was a direction for the purpose of raising portions. I think that whatever be the definition of portions, there can be no doubt that this was a direction for raising portions; it was a direction to set apart a sum in order to raise the sum which was charged by way of portions. Lord St. LEONARDS seems to have thought that it admitted of no sort of doubt. It had previously been decided by the Vice-Chancellor of England, in the case of *Halford v. Stains*, (a) that portions meant portions already existing. If that be so, the decision seems to be well founded; for there can be no possible doubt that the direction to set apart the 15,000*l.*, for the purpose of clearing the estate  
 of the sum charged on it by way of portions, was the very  
 \* 63 \* thing that was contemplated by the Act: it was a provision for raising a sum of money by way of portions, according to any possible interpretation that can be put upon that word. The only doubt was, whether the party, for the benefit of whose children the portions were to be raised, was a person taking an interest under the devise within the meaning of the statute. I confess I rather feel inclined, on that subject, to lean to the observations made

by the person or persons who should for the time being be entitled to the possession of those estates. He further bequeathed 10,000*l.* to trustees, upon trust to invest and pay the dividends to George Viscount Barrington for life, and after his decease to his wife Elizabeth Viscountess Barrington for her life, and after the decease of the survivor of them, Lord and Lady Barrington, in trust for all their children equally, with powers of maintenance and advancement; and he bequeathed to the trustees of the settled estates certain books and plate, to go and be enjoyed with the settled estates as heirlooms. He also gave 20,000*l.*, to be raised by sale of a sufficient part of his consols, to trustees, to stand possessed thereof and of a sum of 10,000*l.*, directed also to be raised, as a fund to erect and furnish a mansion-house on the settled estates, the direction of such erection and furnishing to be left to the person for the time being in possession of the said estates, and declared that, till the whole of the fund should be applied, the same or such part as should not be applied should be accumulated, and at the end of ten years if not applied should be laid out in the purchase of freehold estates, to be settled on the uses of the Bedlington estates. He bequeathed the residue of his personal estate, one-half to George Viscount Barrington absolutely, but if he should be dead at his the testator's decease, then to trustees, upon the trusts of the 10,000*l.* firstly before bequeathed after the decease of the survivor of Lord and Lady Barrington; the other moiety to the said trustees, upon the last-mentioned trusts of the 10,000*l.*

(a) 16 Sim. 488.

in the House of Lords by Lord LYNDEHURST and Lord BROUGHAM in the case of *Evans v. Hellier*; (a) but I do not mean to decide the point, as it does not necessarily arise in the present case. Lord ST. LEONARDS was clearly of opinion that 30,000*l.* given to be expended on a mansion-house in improving the estate settled as I have mentioned, was an interest under the devise within the meaning of the statute. It seems, therefore, to me, that the Master of the Rolls was not at all embarrassed by this decision, in a case where, as I interpret the statute, it is quite clear there were not portions, the fact of there being portions being the very foundation of the decision in *Barrington v. Liddell*. I have come, then, to the conclusion that the present is not a case within the exception of the second section of the statute, and, consequently, that the accumulation must be held to terminate at the end of twenty-one years, that is, in the year 1847.

Then arises the other question. The Master of the Rolls has considered, upon the authority of several cases, that the accumulation ending in the year 1847, the subsequent rents and profits are to go to the next of kin and heir-at-law as undisposed-of parts of the residue. I think, also, that in this the Master of the Rolls was perfectly right, and I come to that conclusion upon both \* precedent and authority beginning, as I conceive, in the \* 64 time of Lord ELDON.

The first question is, whether there are in this case any cross-remainders, or rather limitations in the nature of cross-remainders; that is, whether on the failure of the issue of Miss Edwards, if she should die without having any child that should attain twenty-one, her share in that portion of the accumulation which was to have been made for the benefit of her children is to go over to the children of the nephew. If there are no cross-limitations, *cadet questio*, for then the income of Miss Edwards after 1847 must, under any view of the case, go to the heir-at-law and next of kin; if it is undisposed of, it goes to them as undisposed-of residue, and if the ulterior disposition, which is to the testator's heir-at-law and next of kin, is accelerated, it goes to them by virtue of that disposition. If there are cross-limitations, the children of C. W. Chapman take, in case Miss Edwards should die without a child attaining a vested interest.

(a) 5 Cl. &amp; Fin. 114.

For the purpose of construing the limitation, I must look at it just as if the person taking had been a man instead of a woman; and I must therefore consider that, at the date of the testator's will, whether Miss Edwards would have a child could not be ascertained till after her death, unless she had a child taking a vested interest in her lifetime. It is an executory bequest to the children of C. W. Chapman in case the plaintiff, Miss Edwards, should die and have no child attaining twenty-one. This is clearly good to carry the corpus whenever the event happens; that is, on the death of the plaintiff never having had a child. I am assuming that, on the true construction of the will, there are cross-

limitations, and that the corpus would go over to the children \* 65 of C. W. Chapman. How is it, \* then, as to the interest?

I think, upon the authorities, that the will must be read as if it had directed, first, that the income should be accumulated for twenty-one years, and then added to the corpus (that would be good), and then had directed that the accumulation should go on until the event happened the happening of which was to carry the corpus to the ultimate legatees: that would be bad, and the will must be construed as if there was no such direction; and the consequence is that there is an intestacy. This seems to me clearly to have been the opinion of Lord ELDON in *Griffiths v. Vere*. (a) Lord ELDON there says, "Such being supposed to be the capacity, which every testator and grantor had," that was, to accumulate during all the period during which the vesting was suspended, "this Act passed; and I believe, it was considerably altered from what it was when introduced in the House of Lords; having received alterations in both houses which were not foreseen. But I believe, the object of those who introduced it, and the idea of all, was, that in general, if not in all cases, those rents and profits would have gone, not to persons claiming by disposition, but by the effect of the Act, striking out of the will the direction for accumulation, to those entitled by intestacy; for, if literally pursued, the testator might give his estate to a person, not to take till the expiration of twenty-one years after a life in being; and if he said nothing about accumulation, the rents and profits would be undisposed of: if he directed what the Act authorizes him to direct, that for the first twenty-one years after his death there should be

accumulation, at the end of that time there might be a very long period, during which the rents and profits would go to no one by the disposition, but in the case of real estate would belong to the heir, and in the case \* of personal estate, unless there \* 66 was an express disposition of what was not before disposed of, to the next of kin." That was the opinion of Lord ELDON, and Lord LANGDALE acted on it in *M Donald v. Bryce*, (a) and *Eyre v. Marsden*: (b) in both of those cases he directed the excess of accumulation to go as in the case of intestacy. In the subsequent case of *Ellis v. Maxwell*, (c) decided by the same learned Judge, the excess went to the residuary legatee, there being in that case a gift of every thing not effectually disposed of by the prior clause of the will. In the present case the accumulations beyond the twenty-one years, which expired in the year 1847, appear to me to be undisposed of, and they consequently go in certain portions to the heir-at-law and next of kin.

In my opinion, therefore, the Master of the Rolls was perfectly right, and I give this opinion with the less hesitation because his decree does not appear to me to militate against the decision of Lord St. LEONARDS to which reference has been made. If I thought that it did, I should have felt great difficulty in supporting it, although Lord St. LEONARDS did differ from the Lord Justice TURNER in *Barrington v. Liddell*. It appears to me, that Lord St. LEONARDS's decree in that case was right, and that the Master of the Rolls in the present case was also right, both in the construction which he put upon the statute and in the mode in which he directed the excess of accumulation to be applied.

THE LORD JUSTICE KNIGHT BRUCE.—In this case, Mr. Charles William Chapman being dead, his deceased children having died in the testator's lifetime minors, without having been married, the other children of Mr. Charles William Chapman having all attained \* majority, and Miss Edwards, the testator's grand- \* 67 daughter, a lady now in the fifty-fourth or fifty-fifth year of her age, having never been married; no question is raised concerning the capital or income of that moiety of his residuary property which may be called the Chapman moiety. The only questions raised are as to the other half, the Edwards moiety; and the testator's death having happened in the year 1826, and the income

(a) 2 Keen, 276.

(b) 2 Keen, 564.

(c) 3 Beav. 587.

of this half having been added to the capital by way of accumulation during twenty-one years next after that event, the point mainly argued before us has been, what ought to be the application or destination of the income of the original and accumulated capital from the end of those twenty-one years until the death of Miss Edwards, or the existence of a child of that lady, whichever of the two events shall first or alone happen.

What I should have done if this cause had come before me, not by way of appeal, but originally, I know not; for after closely attending to the able observations of the learned counsel who have debated it in this court, and the relevant authorities of importance, so far as I am aware of them, I have found it impossible to satisfy my mind whether the obscure will before us is affected by the still darker Act of Parliament, which is contended by the respondents, and denied by the appellants to affect it; or whether, if in that contention the appellants are wrong, the decree or order under appeal has proceeded upon an accurate view of the mode and direction in which the statute operates, and accordingly has correctly dealt with so much of the income of the testator's property as falls within it; or whether, if Miss Edwards were to die on this day, not having married, the Edwards moiety of the residuary estate, as it stood at the end of the twenty-one years, would belong to the Chapmans.

\* 68     \* This failure on my part has not been for want of considering the case thoroughly; I have considered it so thoroughly as to be convinced that I cannot, for any useful purpose, consider it longer; and have only to add, what it is perhaps surplusage to add, that, doubting the correctness of the decision under appeal, I am not so persuaded of its incorrectness as to be able, with propriety, to give a voice for reversing or varying it, which, therefore, I must necessarily decline to do.

THE LORD JUSTICE TURNER. — Whether looked at with reference to the construction of the will, or to that of the statute, this case presents considerable difficulty; and if it were necessary to give an opinion upon the construction of the statute, and the effect of the decisions upon it, my opinion concurs with that of the Lord Chancellor to this extent, that the interests here in question are not “portions” within the meaning of the Act. Beyond that it is not necessary to go.

The first question arises upon the construction of the will, and is this : whether, in the event of Miss Edwards having no child, the children of Mr. Chapman were intended to take the entirety of the residue. Now the dispositions made by the will are these : The trustees are directed to invest and accumulate the income of the residuary estate during the lives of the persons for whose benefit estates are devised and bequeathed, and to go on with the accumulation until the period of distribution arrives. Subject to these trusts, the testator directs his trustees to stand seised and possessed of and interested in the freehold, copyhold, or leasehold estates, and the moneys to arise from the sales, and all accumulations, in trust to divide the same into two equal parts, and pay or transfer one of such parts unto and amongst all and \* every \* 69 the child and children of Miss Edwards, in equal shares and proportions, as tenants in common, and to pay or transfer the remaining part unto and amongst all and every the child or children of Mr. Chapman, in the same way. Then the testator provides that the share of each child of Miss Edwards and of Mr. Chapman, " respectively," should be a vested interest in such of them who, being sons, should attain the age of twenty-one or die under that age leaving issue, and being daughters should attain that age or be married. Then comes this clause : " And I do hereby further declare that if any such child or children shall depart this life without having attained a vested interest in his or her share of the said trust estate and premises, the share of each child so dying shall accrue and belong to the survivors or survivor of the said children, and the heirs, executors, and administrators of such survivors, if more than one in equal shares, and shall become vested, and be conveyed, paid, and transferred at such ages or times and in such manner as is hereinbefore directed concerning his, her, or their original share or shares respectively." Then comes the clause for the accruer of the accrued shares, and the will closes with this clause : " In case there shall not be any children or child of the said C. W. Chapman, and of my said granddaughter, Frances Edwards, or of either of them ; or, being such, if all such children shall depart this life without having attained any vested estate and interest in my said trust estate and premises, or any part thereof, then and in such case," &c. [His Lordship read to the end of the clause.]

There is, therefore, a division of the residue into moieties, and a

gift of one moiety to the children of Miss Edwards, and of the other to the children of Mr. Chapman. This is not altered by the

direction that the shares shall be transferred to sons at  
\* 70 twenty-one, \* and to daughters at that age or marriage; or

by the direction that they shall be vested in sons at twenty-one or earlier death, leaving issue, and in daughters at twenty-one or marriage, these directions still applying to the original shares, viz. to the moieties. I observe that the word "respectively" occurs in the direction as to vesting, but that does not alter the case. The word "respectively" may mean either the respective shares of the children, or the shares of the children of Miss Edwards and Mr. Chapman respectively. Being found in a clause which relates to the shares of the children, I think it must mean their respective shares.

Thus far, therefore, the moieties are kept separate. But then comes the clause, that if any such child or children shall die without having attained a vested interest in his or her share, the share of every such child so dying shall accrue and belong "to the survivors or survivor of the said children."

The question then arises, whether this clause is to be read distributively, thus: The shares of the children of Miss Edwards shall accrue to the survivors or survivor of her children, and the shares of the children of Mr. Chapman to the survivors or survivor of his children. In my opinion the clause must be so read.

The words "any such child or children" must mean any child or children of Miss Edwards or of Mr. Chapman; and the words "the said children" are referential to the words "any such child or children." The words "survivors or survivor of the said children" therefore mean the survivors or survivor of the children of Miss Edwards or of Mr. Chapman. This construction is fortified by the consideration that there is a distinct gift in moieties and that something must be found equally distinct to alter it.

\* 71 \* The construction which would give any part of the share originally bequeathed to a child of one family to the children of the other would seem to be foreign to the intention of the testator. The effect of such a construction would be, that if each had one child, and one had a second child born which only lived an hour,—the estate which, if the second child had not been born, would have been divisible in moieties between the two children, would become divisible thus,—in three-eighths and five-eighths.

Such a consequence does not appear consistent with the testator's intention.

So far, I think, we arrive with tolerable safety at the conclusion that the moiety is to be kept distinct. It remains to be considered whether the last clause alters this conclusion. After much consideration of that clause, I think that it does not alter the distributive character of the previous dispositions. I think that the word "either" in it must be construed "one." For we have not only the words "shall not have been applied or disposed of for the purposes aforesaid," but there are also the words, "or any part thereof" in the clause having reference to the death of children without attaining a vested interest. And upon no other construction than that of applying the clause to the several moiety is do I see how a child could attain a vested interest in part, without attaining a vested interest in the whole.

My construction, therefore, of the will is, that all the clauses of the will are to be read distributively, and that if Miss Edwards dies without children, her moiety will go to the heir and next of kin, and not to the Chapmans.

Then arises the question upon the construction of the statute. And this question is confined to Miss Edwards's \*child- \*72 ren's moiety, there being, as I understand, no dispute as to the Chapman moiety.

The question is, Miss Edwards having no children, what becomes of the income of the moiety given to her children, accrued after the expiration of the twenty-one years from the testator's death, and of the income of the fund accumulated from that moiety during the twenty-one years. Now it seems to me that in any event the heir and next of kin must be entitled.

Either the statute applies, or it does not. If the statute applies, one or other of these consequences must follow: either its effect must be to strike the trust for accumulation out of the will, as in *Eyre v. Marsden* and *Boyce v. McDonald*, or it must constitute a statutory disposition of the income in favour of the persons entitled, subject to the trust for accumulation. In the former case, the heir and next of kin must take as upon an intestacy. In the latter they must take under the statutory disposition, for, there being no child of Miss Edwards, there is no person who can take before them. The income cannot remain to abide the event of Miss Edwards having children, because the statute says it shall go



to and be received by the person who would be entitled if there was no trust for accumulation. There is no person but the heir and next of kin to whom it could go, or by whom it could be received.

But if the statute does not apply, or, in other words, if these are portions within the meaning of the exception, then there is a valid trust for accumulation during the life of Miss Edwards. But as there is now no possibility of her having children, the trust is to accumulate for the benefit of the heir and next of kin; that is to say, they have vested interests, subject to be divested

\* 73 \* only in an event which cannot happen. And having vested interests in the capital to be accumulated for their benefit, they are entitled to present payment.

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### PEACOCK v. STOCKFORD.<sup>1</sup>

1853. January 31. Before the LORDS JUSTICES.

A testator bequeathed life interests in four distinct funds to four nieces respectively, and directed that, upon the decease of any or either of them, the principal of the fund the interest of which was to be received by her or them should be held in trust for "the benefit of all and every the lawful children of her or them so dying and of the survivors or survivor of my other nieces hereinbefore named in equal shares." One of the nieces having died, leaving two children: *Held*, that her fund was divisible among these children and among the children of the three other nieces; it being proper to give some force to the word "of," and that word being referable to the word "children" as the last antecedent.<sup>2</sup>

THIS was an appeal from the decision of Vice-Chancellor KINDERSLEY, upon the petition of Thomas Bonnett and Michin Lake, two of the defendants.

The question was as to the construction of the will of Thomas Slaughter, dated the 22d of April, 1823, whereby the testator, among other bequests, gave and bequeathed to his executors and trustees 9000*l.* new 4*l.* per cent bank annuities, a bond condi-

<sup>1</sup> S. C., 7 De G., M. & G. 129.

<sup>2</sup> See 2 Jarman Wills (3d Eng. ed.), 185; *Hawkins v. Hamerton*, 16 Sim. 410; *Darby v. Darby*, 18 Beav. 412; *Re Davies*, 29 Beav. 93.

tioned for the replacement of 1000*l.* 3*l.* per cent consolidated bank annuities, a debt of 1500*l.* due to the testator, and a sum of 3500*l.* 3*l.* per cent consolidated bank annuities: upon trust, in the first place, immediately after the testator's decease, to pay the dividends, interest, and annual proceeds of 5000*l.*, part of the sum of 9000*l.* 4*l.* per cent bank annuities, and the bond debt above mentioned, to his niece the defendant Sarah Stockford for her life for her separate use; and upon further trust to pay the dividends, interest, and annual proceeds of the sum of 2000*l.* other part of the sum of 9000*l.* 4*l.* per cent bank annuities to his niece (another defendant) Elizabeth Edmonds for her life for her separate use; and upon further trust to pay the dividends, interest, and annual proceeds of the sum of 2000*l.*, remainder of the sum of 9000*l.*

4*l.* per cent bank annuities, \* to his niece (another defendant) \* 74 Ann Mann for her life for her separate use; and upon further trust, as to the debt of 1500*l.*, to reinvest the principal, when paid, in the stock of new 4*l.* per cent annuities, and in the mean time, and also after such reinvestment, to pay the dividends, interest, and annual proceeds to his niece (another defendant) Ann Burnett for her life for her separate use; and upon further trust to pay the dividends, interest, and annual proceeds of the sum of 3500*l.* 3*l.* per cent consolidated bank annuities to Mary Slaughter for her life for her separate use; and after her decease to stand possessed of and interested in the said sum of 3500*l.* 3*l.* per cent consolidated bank annuities in trust to pay the dividends, interest, and annual proceeds thereof unto his nieces Ann Mann and Elizabeth Edmonds in equal shares and proportions during their joint lives and for their separate use.

The will then proceeded as follows: "And upon the decease of any or either of my said nieces Sarah Stockford, Elizabeth Edmonds, Ann Mann, and Ann Burnett, to stand and be possessed of the principal sum or sums (the interest or dividends of which is to be paid to or received by her or them during their lives), in trust for the benefit of all and every the lawful children of her or them so dying, and of the survivors or survivor of my other nieces hereinbefore named, in equal shares and proportions, the respective shares of such child or children as may be a son or sons to be paid or assigned and transferred to him or them, as and when he or they shall attain his or their age or ages of twenty-one years respectively, and the share or shares of such as may be daughters

on their respectively attaining that age or being married, and the interest and dividends thereof or any part or parts of the principal to be sooner disposed of and applied for his and their education, maintenance, preferment, \* or advancement in the world in such manner as the said trustees and executors shall think fit. Provided always, and my will also is, that if either or any such child or children shall die without leaving issue before he, she, or they shall attain the age of twenty-one years, or being a daughter or daughters before she or they shall be married, then the share or shares of him, her, or them so dying as aforesaid, or so much thereof as shall not have been applied and disposed of for his, her, and their preferment or advancement in the world, shall from time to time go to the survivor and survivors of such children, and be paid, applied, assigned, and transferred to him, her, or them equally, share and share alike, at such time or times and in the same manner as is hereinbefore mentioned and expressed touching his, her, and their original share and shares."

The testator died on the 23d of August, 1823. He left his four nieces him surviving. One of them, Sarah Stockford, had never been married. Another of them, Elizabeth Edmonds, had never had any child. A third, Ann Burnett, had had four children, of whom two were still living, but the other two had died in the lifetime of the testator. The fourth niece, Ann Mann, had had two children, Mary Ann Mann and Harriet the wife of John Butt, both of whom were still living.

Ann Mann having died on the 12th of September, 1852, a petition was presented for the distribution of the funds to the income of which she was entitled for her life, and upon that petition the order now appealed from was made by the Vice-Chancellor, deciding that the fund representing the 2000*l.* 4*l.* per cent annuities, in which she had a life interest, became divisible upon her death in five equal shares between the three surviving nieces \* 76 of the testator and the two daughters of Ann Mann, that \* is to say, between Sarah Stockford, Elizabeth Edmonds, and Ann Burnett, and Mary Ann Mann and Harriet Butt and their incumbrancers, in equal shares.

*Mr. Rolt* and *Mr. Giffard* appeared for the appellants.

*Mr. Bacon*, *Mr. Law*, and *Mr. Baggallay*, for different respondents.

The arguments and authorities relied upon appear from the judgment.

The Lord Justice TURNER, after stating to the effect above mentioned, said: We have felt the great weight which is due to the opinion of the Vice-Chancellor in this case, and it is with great reluctance we differ from him upon a question open to so much doubt; but, after repeatedly considering this will, we have been unable to satisfy our minds that the construction he has put upon it is correct.

This construction, which lets in the surviving nieces or niece to take equally with the children of any niece or nieces who may die, appears to us to be open to many objections. It would, if the words survivors or survivor be read in their natural sense, give to each of the nieces a contingent interest in the capital of the fund, to the income of which the other nieces were entitled for their lives; and, if the last surviving niece should die without having had a child, the capital of the fund, to the income of which she was entitled, would fall into the residue. If, on the other hand, the words "survivors or survivor" be construed in the artificial sense of "others or other,"<sup>1</sup> and any one of the nieces died, without having had a child, the other nieces would take the capital, to the income of which the deceased niece had been entitled to \* the exclusion of the niece so dying. Each niece would \* 77 take a reversionary interest in the funds in which the others took life interests. It is most improbable that the testator could have entertained such intentions as these; and we are satisfied, from these and other considerations, that a construction which leads to such consequences ought not to be adopted by the Court, unless it is absolutely driven to it.

Another, and, as it seems to us, a more probable intention to be imputed to the testator, is, that the children of each niece were to take the capital, in which their parents took a life interest, and that the survivors or others of the nieces were to take the capital if the deceased niece had no children. But, probable as this intention is, we think the words of the will do not warrant us in adopting that construction. It could, we think, be arrived at only by interpolating after the limitation to the children, and before the

<sup>1</sup> See 2 Jarman Wills (3d Eng. ed.), 648 *et seq.*

limitation to the survivors, the words "if there shall be no children;" and if a sensible construction can be put upon the words as they stand, it is clear that we should not be justified in making any interpolation.

Being, then, satisfied that the surviving nieces cannot take with the children of the deceased nieces, and that the construction, which would give the shares of the deceased nieces to their children, and, in default of children, to the survivors or others of the nieces, cannot be maintained, it seems to us to follow, as almost a necessary conclusion, that the parties to take the fund in question must be the children of all the nieces. For, the surviving nieces being excluded, the children are to take, and, as each class does not take its parent's share, all must take together.

\* 78 \* Each step, however, by which we have arrived at this result, is open to doubt and difficulty, and we should have felt even more hesitation upon the case than we have, if we had not found authority, which, in our opinion, supports the conclusion to which we have come.

In cases of this nature we think that the only safe course is to adhere to the words of the will, to give effect to all of them, and to construe them according to the ordinary rules. Now, in this case, the terms of the disposition are, "In trust for the benefit of all and every the lawful children of her or them so dying and of the survivors or survivor of my other nieces;" not, "in trust for the benefit of the children of her or them so dying and the survivors or survivor of my other nieces." Had the disposition been in the latter form, the surviving nieces must, we think, have been held entitled, according to the decision in *Lugar v. Harman*, (a) and what is said in *Doe v. Joinville*. (b) In *Lugar v. Harman* there was a gift of residue to H. for life, and after his death "to be divided equally amongst the children of my late cousin Edward Lugar and my cousin P. Fearis and their lawful representatives," and it was held that P. Fearis, and not his children, took with the children of E. Lugar; but it may be collected from the report that had the word "of" been introduced between the words "my cousin P. F.," the decision would have been the other way; and we think this distinction is well founded, for it is an undoubted general rule that some effect is to be given to every word of a will, and the con-

(a) 1 Cox, 250.

(b) 3 East, 172.

struction suggested would have been necessary to give some effect to the word "of." Assuming that we are right in considering that, in the absence of the introductory word "of," the surviving nieces would have been \* entitled, the same principle of \* 79 construction seems to us to govern the present case, for then, in order to give the word "of" some effect, it would be necessary to refer it to the children. It was said, however, that effect would be given to it by referring it to the words "for the benefit" by which the sentence is introduced: in effect, reading the sentence as if it stood, "In trust for the benefit of all and every the lawful children of her or them so dying, and for the benefit of the survivors or survivor of my other nieces;" but we think this would not be consistent with the ordinary rules of construction, for in Noy's Maxims we find this rule laid down,—" *Ad proximum antecedens fiat relatio, nisi impediatur sententia.*" (a) And several instances are cited in support of it.

Upon the whole, therefore, the conclusion at which we have arrived, after much doubt and hesitation, is, that the Vice-Chancellor's order must be altered, and it must be declared that this fund is divisible in fourths amongst the four children of the nieces, and directions must be given accordingly.

The Lord Justice KNIGHT BRUCE concurred.

1853. January 25, 28, 29. February 14 and 15. March 4. Before the LORDS JUSTICES. (b)

Slaves in the West Indies were bequeathed to executors, upon trusts for a niece of the testator for her life with remainder to her children. The executors having renounced and disclaimed, administration with the will annexed was granted to the niece, who afterwards married a minor. Before her husband had attained twenty-one, the husband and wife executed a settlement, reciting that the husband was, in right of the wife, possessed of the slaves, theretofore the property of her late uncle; but not in any manner referring to the will. The settlement purported to assign the slaves to trustees, in trust to sell and

(a) Page 4, Bythewood's edit.

(b) The Lord Chancellor was present during a part of the argument.

invest the proceeds and pay the income for the separate use of the wife for life, without power of anticipation, with trusts, by way of remainder to the children of the marriage. Before the husband came of age the husband and wife sold the slaves without noticing the settlement in the contract, but paid part of the purchase-money to one of the trustees of the settlement, the other trustees not concurring in or being in fact aware of the sale or payment. An amicable bill was then filed on behalf of the infant children of the marriage, to have the trusts of the settlement carried into execution, or a new settlement made in conformity with an offer of the husband to execute such settlement on receiving 3500*l.* out of the wife's fortune. This bill contained an allegation that the proceeds of the slaves had been invested in the names of the trustees. The trustees, by their answer, admitted the truth of this allegation. The husband and wife, answering separately, disputed the validity of the settlement, and stated that the wife was not intended to be bound by it; but the husband offered to execute a settlement on the above terms. The decree declared the settlement void, and directed a new settlement to be made upon the footing of the husband's offer. A settlement was accordingly executed, and the 3500*l.* paid to the husband. Afterwards it was discovered that the admission in the trustees' answer was incorrect, the trustee who received the proceeds of the slaves having applied the money to his own use, and having by false statements induced his co-trustees to believe, and upon their answer admit, that the investment in their names and his had been made as there stated. His circumstances were such that any attempt to recover the amount at any period would have been hopeless. More than twenty years after the wife was aware of these circumstances she instituted a suit against the co-trustees to make them personally liable for the breach of trust. *Held*,

First, That the above facts, independently of the admission of the co-trustees in their answer, did not render them personally liable in respect of the proceeds of the sale of the slaves, the title of the settlors not having been such as to enable the trustees legally to possess themselves of the fund.<sup>1</sup>

Secondly, That in the circumstances of the case that admission did not create any such liability.

*Seemle*, that a clause restraining a married woman from anticipation does not exempt her from the ordinary consequences of lapse of time and acquiescence.

*Seemle*, that in the circumstances above stated, the administratrix committed a breach of trust by marrying without providing for the security of the trust property.

*Seemle*, that having by her separate answer in the first suit stated that the first settlement was not intended to be binding upon her, she could not afterwards sue the trustees for non-performance of the trusts of it.

*Seemle*, that her having concealed from them the nature of her title when she assumed to settle the funds, would of itself have been a defence to such a suit.

THIS was an appeal from a decision of Vice-Chancellor PARKER, reported 5 De Gex & Smale, 702.

<sup>1</sup> See *Pearce v. Pearce*, 22 Beav. 250.

\* The following statement of the facts of the case is trans- \* 81  
posed to this place from the commencement of the judgment  
of the Lord Justice TURNER:—

The bill was filed by Mary Derbishire, the wife of Henry Grant Derbishire, by her next friend, mainly for the purpose of charging some trustees and representatives of deceased trustees and the husband of the plaintiff with the sum of 4869*l.* 11*s.* 3*d.* 3*l.* per cent consolidated annuities, and the dividends thereon. There was a subordinate part of the case which had reference to the dividends upon a proof against the estate of Marsh & Co. for the sum of 3500*l.*, the cash with which the 4869*l.* 11*s.* 3*d.* consols was represented to have been purchased, and to the application of these latter dividends; but the main part of the case related to the above-mentioned stock.

The equity of the bill, as to this part of the case, was summed up by the following pretence and charge. And the said defendants, Francis Home, William P. de Bathe, Charles Hoare, Henry Merrick Hoare, Sir Orford Gordon, John Hogge, and Thomas Deane Shute, sometimes pretend that the said sum of 4869*l.* 11*s.* 3*d.* 3*l.* per cent consolidated bank annuities, and the other moneys arising from the said negro and other slaves as aforesaid, were in some manner lost to the said trust estate by means of the fraud of the said Henry Fauntleroy, and without any neglect or default of the said Sir Hildebrand \* Oakes, Jabez Mackenzie, \* 82  
Sir William P. de Bathe, and Francis Home; whereas the plaintiff charges the contrary of such pretence to be the truth, but that, in any event, the estate of the said Sir Hildebrand Oakes, and the said Sir William P. de Bathe, and Francis Home, are liable for the acts and defaults of the said Henry Fauntleroy, they having authorized, or, at all events, knowingly permitted him to receive the said sum of 3500*l.* on behalf of himself and the said Sir Hildebrand Oakes, Sir William P. de Bathe, and Francis Home. So that the case which in this respect the plaintiff sought to establish was the liability of the trustees (who, or whose estates, were sought to be charged), by reason of their having authorized or permitted Fauntleroy, their co-trustee, to receive the 3500*l.*, involving a charge of neglect on their part for not having themselves got in or seen to the investment of that sum.

The circumstances of the case were the following:—

Sir John Stuart being entitled, among other property, to a gang-



of slaves belonging to a plantation in one of the Bahama Islands, by his will, dated the 5th of March, 1801, gave to the plaintiff, then Miss Mary Fenwick, the whole residue of his property, real and personal, wheresoever the same might be, and directed that the interests or annual proceeds thereof should be applied, as far as might be necessary, towards her education and maintenance until she attained the age of twenty-one years, at which period he directed that she might receive from his estate the principal sum of 600*l.* sterling, together with the savings of interest during her minority, with all the plate, pictures, jewels, trinkets, or articles of household use, belonging to him, for her own absolute

\* 83 \* use and disposal; after which appropriation the testator directed that his entire remaining principal property, real and personal, might be so settled upon his said niece, that in the event of her marriage, either then or at any future period, the said property might be secured to herself, with reversion at her decease, according to her own choice of distribution, to any such children as she might have, independently of any right or power of her husband therein, and that the entire annual proceeds or interest thereof might be paid to her, in half-yearly payments, for her own use and appropriation during her life, subject to a condition thus expressed: "On condition, nevertheless, that she resides in Europe, for which she shall enter into such proportional bond or engagement in favour of her next heirs under this my will as my executors, whom I appoint also trustees, are hereby directed to require." And the testator nominated Charles Shaw, James Simpson, and Frederick Booth, executors of his will.

The testator died in March, 1815. The executors and trustees renounced; and on the 30th of May, 1815, letters of administration, with the will annexed, were granted to the plaintiff.

In the month of January, 1817, the plaintiff married Henry Grant Derbishire, who was then an infant. There was no settlement upon the marriage, and on the 19th of November, 1818, the plaintiff and Mr. Derbishire, he being then still an infant, entered into an agreement for the sale of the slaves, which was as follows: "Articles of agreement made and entered into this 19th day of November in the year of our Lord 1818, between Henry Grant Derbishire, of Crawford Street, Portman Square, in the

\* 84 county of Middlesex, Esquire, and Mary his wife, \* late Mary Fenwick (the niece, residuary legatee, and administratrix,

with the will and codicil annexed, of General Sir John Stuart, late of Clifton, in the county of Gloucester, deceased) of the first part; Henry Wood, of Liverpool, in the county palatine of Lancaster, merchant, of the second part; and John Moss, of Liverpool aforesaid, banker, of the third part: Whereas the said Sir John Stuart was in his lifetime, and at the time of his death, possessed of and entitled to a gang or number of various negro slaves, consisting of the several persons mentioned and specified in the schedule hereunder written or hereto annexed, and late in, upon, about, or belonging to a certain plantation called Stuart's Manor, in the island of Exuma, Bahamas, in the West Indies, and elsewhere in the said island: and whereas the said John Stuart duly made and published his last will and testament in writing, bearing date the 5th day of March, 1801, and thereby (after making certain bequests therein specified) gave and bequeathed unto his beloved niece the said Mary, the wife of the said Henry Grant Derbyshire, then Mary Fenwick, the whole residue of his property, real and personal, wheresoever the same might be, subject to certain limitations and restrictions therein fully stated; and the said testator appointed the said Mary Derbyshire executrix, together with Charles Shaw, James Simpson, and Frederick Booth, Esquires, executors of his said will; and the said Sir John Stuart, on the 24th day of May, 1815, made and published a codicil to his said will, without in any manner revoking the same: and whereas the said Sir John Stuart departed this life on or about the 2d day of April, 1815, without having revoked or altered his said will or the codicil thereto, and the said Charles Shaw, James Simpson, and Frederick Booth, having in due form of law renounced the execution thereof, administration, with the will annexed, of all and singular the goods, chattels, \* and credits of the said testators, was on or \* 85 about the 30th day of May, 1815, duly granted by the Pre-rogative Court of Canterbury to the said Mary Derbyshire during her residence in Europe, but no further or otherwise; and the said Mary Fenwick hath since intermarried, and is now the wife of the said Henry Grant Derbyshire: now these presents witness that the said Henry Grant Derbyshire and Mary his wife do and each of them doth agree with the said Henry Wood to sell to him and deliver or cause to be delivered over into his possession in manner hereinafter mentioned all the gang and number of male and female negro slaves late of and belonging to the said Sir John Stuart,

deceased, in, upon, about, and belonging to the said plantation called Stuart's Manor, in the island of Exuma, Bahamas, and elsewhere in the said island, which were late the property of the said Sir John Stuart, deceased, and of or to which the said Mary Derbishire, as the residuary legatee or administratrix, or the said Henry Grant Derbishire in her right, or either of them, or any person or persons as their agent or attorney, is or are possessed or entitled, and which are mentioned and specified in the schedule hereunder written or hereto annexed, and all and every the progeny and offspring of the same slaves, together with all and every the clothes, apparel, and tools, utensils and implements, effects, and things, respectively of and belonging to the said slaves, and every or any or either of them, at or for the price or sum of 4000*l.*, subject nevertheless to such deduction or addition as is hereinafter mentioned, and to be secured in the manner hereinafter mentioned: and also that they the said Henry Grant Derbishire and Mary his wife, their executors and administrators, on receiving from James Wood, as the agent of the said Henry Wood, such securities for the payment of the said before-mentioned price as the case \* 86 may be as are \* hereinafter mentioned, shall and will, at the costs and charges of the said Henry Wood, his executors, administrators, or assigns, execute by themselves or by their attorney or attorneys, duly authorized for that purpose, a proper bill of sale, or other necessary instrument or instruments of assignment or conveyance for assuring and conveying, as far as the said Henry Grant Derbishire and Mary his wife lawfully can or may, the absolute property and interest in the before-mentioned slaves, and other effects and things hereinbefore agreed to be sold and disposed of by them the said Henry Grant Derbishire and Mary his wife, with their appurtenances." [Then followed an agreement on the part of the purchaser to purchase the slaves, and various provisions and stipulations incidental to the contract.]

Pending the treaty for this sale there was a correspondence between the plaintiff and the purchaser, in which the plaintiff referred to the will. On the day next following the date of the contract, viz. the 20th of November, 1818, was executed the first instrument to which the trustees were parties. It was a settlement of that date made between Mr. and Mrs. Derbishire, of the one part, and Sir Hildebrand Oakes, Bart., William Plunket de Bathe, Esq., Francis Home, Esq., and Henry Fauntleroy, Esq., of

the other part. It recited the marriage, and that Mr. Derbshire was in right of the plaintiff his wife possessed of or entitled to 6658*l.* 15*s.* of lawful money of Great Britain, and was also entitled in right of his wife to the sum of 1888*l.* East India stock, which had been transferred unto and was then standing in the name of Mr. Derbshire in the books kept for entering the transfer of East India stock; and that Mr. Derbshire was in right of his wife further possessed of or entitled to certain negroes or other slaves, \* amounting in number to seventy or thereabouts, \* 87 theretofore the property of her late uncle, Sir John Stuart, deceased, and which were then or lately were hired out to a Mr. Forbes, and that it was lately agreed by and between Mr. and Mrs. Derbshire that the sum of 6658*l.* 15*s.* should be invested in the purchase of a competent share of 3*l.* per cent consolidated bank annuities in the joint names of Sir Hildebrand Oakes, William P. de Bathe, Francis Home, and Henry Fauntleroy, and that the East India stock should be transferred into the same names; and that it was also agreed that the aforesaid negroes or slaves, together with the offspring and issue of the females of the negroes and other slaves should be assigned to Sir Hildebrand Oakes, William P. de Bathe, Francis Home, and Henry Fauntleroy, upon trust to sell and dispose of the same. By the first witnessing part it was declared that Sir Hildebrand Oakes, William P. de Bathe, Francis Home, and Henry Fauntleroy, their executors, administrators, and assigns, should stand and be possessed of the sum of 8550*l.* 11*s.* 3*d.* 3*l.* per cent consolidated bank annuities and 1888*l.* East India stock, then respectively standing in their names as thereinbefore was mentioned, and of and in the dividends, interest, and annual produce thereof, upon trust either to permit the sums of 8550*l.* 11*s.* 3*d.* 3*l.* per cent consolidated bank annuities and 1888*l.* East India stock to remain in their then actual state of investment, or to vary the same, with the consent of H. G. Derbshire and the plaintiff his wife, during their joint lives, and after the decease of either of them with the consent in writing of the survivor of them during his or her life, and after the decease of such survivor at the discretion of the trustees or trustee for the time; and to stand possessed of and interested in all and singular the trust moneys, stocks, funds, and \* securities, \* 88 and the interest, dividends, and annual produce thereof, upon trust from time to time during the joint lives of Henry Grant

Derbshire, and the plaintiff, his wife, to apply the interest, dividends, and annual produce as the plaintiff, notwithstanding her coverture, should from time to time by any writing or writings under her hand (but not so as to dispose of or affect the same in the way of anticipation) or otherwise direct or appoint, and in default of such direction and appointment into her own hands for her separate use. And after the decease of either of them, Henry Grant Derbshire and the plaintiff, to pay the interest, dividends, and annual produce of the trust moneys, stocks, funds, and securities to, or permit the same to be received by the survivor and his or her assigns during his or her life, for his or her and their own proper use and benefit; and after the decease of the survivor, to stand possessed of the trust funds, in trust for all and every the children and child of Mr. Derbshire by the plaintiff who being a son or sons should attain the age of twenty-one years, or being a daughter or daughters should attain that age or marry, to be divided between or among them if more than one in equal shares and proportions, and if there should be but one such child the whole to be in trust for that one child. And the deed then contained certain trusts relating to the maintenance and education of the children, and limitations by way of accruer. By the second witnessing part, for a nominal consideration Mr. and Mrs. Derbshire assigned unto Sir Hildebrand Oakes, William P. de Bathe, Francis Home, and Henry Fauntleroy, their executors, administrators, and assigns, all and singular the thereinbefore-mentioned negroes and other slaves (amounting in number to seventy or thereabouts), together with the offspring and issue of the females of the said negroes or other slaves, upon trust, as soon as conveniently

\* 89 \* might be (and with or without the concurrence of Mr.

Derbshire and the plaintiff his wife), absolutely to sell and dispose of the same either by public auction or private contract to any person or persons willing to become the purchaser or purchasers thereof, for such price or prices or sum or sums of money as Sir Hildebrand Oakes, William P. de Bathe, Francis Home, and Henry Fauntleroy, or the survivor of them, or the executors, administrators, or assigns of such survivor, should deem proper, and for the purposes aforesaid, to enter into, make, and execute all necessary and proper sales, contracts, agreements, assignments, acts, deeds, matters, or things, which were to be valid and effectual to all intents and purposes whatsoever, although Mr. and Mrs.

Derbshire should not join therein or concur therewith. And it was thereby agreed and declared that Sir Hildebrand Oakes, William P. de Bathe, Francis Home, and Henry Fauntleroy, their executors, administrators, and assigns, should stand and be possessed of and interested in the sum or sums of money to arise or be produced by any sale to be made in pursuance of the trust lastly thereinbefore declared, and of and in the profits to arise in the mean time and until the negroes and other slaves should have been so sold as aforesaid, upon and for such trusts, intents, and purposes, and with, under, and subject to such powers, provisos, agreements, and declarations as were thereinbefore expressed, declared, and contained of and concerning the sum of 8550*l.* 11*s.* 3*d.* 3*l.* per cent consolidated bank annuities and 1888*l.* East India stock, and the dividends, interest, and annual produce thereof respectively, or as near thereto as circumstances would admit.

This settlement, therefore, set up and proceeded upon a title totally different from the title on which the agreement \* for the sale of the slaves proceeded, and it settled the \* 90 property on trusts differing from those limited by Sir John Stuart's will.

Some time after the execution of this settlement, 3500*l.*, part of the proceeds of the slaves, was, as alleged by this bill, received by Henry Grant Derbyshire, and paid over by him to Henry Fauntleroy upon the trusts of the settlement. The evidence, however, on this part of the case was not clear. But whatever might have been the true state of the case, it sufficiently appeared that the trustees ultimately treated and considered the 3500*l.* as having been paid to Fauntleroy upon the settlement trusts.

Henry Grant Derbyshire attained twenty-one, according to his own statement in his answer, in July, 1821.

He then disputed the settlement, and there being two children born of the marriage, a bill was filed in the names of the children as plaintiffs against Mr. and Mrs. Derbyshire and the trustees. It alleged that previously to and at the time of the marriage Mrs. Derbyshire was entitled as administratrix and sole next of kin of Sir John Stuart, deceased, to the sum of 6658*l.* 15*s.* sterling, the sum of 1888*l.* East India stock then standing in the name of Sir John Stuart, and to certain negro slaves in the island of Little Exuma, one of the Bahama Islands, and other moneys and effects. It

further stated the indenture of settlement, and that the negro slaves were some time after the date and execution of that deed, and in pursuance of the trusts thereof, sold or disposed of, and produced the net sum of 3500*l.*, which sum of 3500*l.* had been

invested in the purchase of the sum of 4869*l.* 11*s.* 3*d.* 3*l.* per \* 91 cent consolidated bank annuities \*in the names of Sir Hildebrand Oakes, Sir William de Bathe, Francis Home, and Henry Fauntleroy, and was then with other trust stock standing in their names. It further stated that it was alleged that at the time the settlement was executed Mr. Derbshire was under the age of twenty-one years. It further stated that Mr. and Mrs. Derbshire sometimes alleged that they were willing and desirous, if the indenture of settlement should be deemed not to be a binding settlement, to make and execute a good, valid, and effectual settlement, and to confirm the settlement as to a part of the trust funds for the benefit of the then plaintiffs and such other children as Mr. and Mrs. Derbshire might have, on receiving a part only of the trust funds, and that Mr. and Mrs. Derbshire alleged that they or Mr. Derbshire had contracted some debts in the maintenance of themselves and the then plaintiffs their children, and otherwise, to the amount of 3500*l.* or thereabouts, and that they were desirous to receive out of the trust funds the sum of 3500*l.* only, and had proposed to Sir Hildebrand Oakes, William P. de Bathe, Francis Home, and Henry Fauntleroy, to sell out and dispose of so much of the trust funds as should be sufficient to raise the sum of 3500*l.* to be paid to Mr. and Mrs. Derbshire for the purpose of paying their debts, and to answer their then present occasions, and had proposed and offered, on receiving and being paid 3500*l.* as aforesaid, to make and execute any proper deed or instrument for confirming the settlement with respect to the remainder of the trust funds or effectually to settle the same for the benefit of the then plaintiffs and the other children of the marriage. The prayer was that it might be declared by the Court that the settlement was a

valid and binding settlement, and that Sir Hildebrand Oakes, \* 92 William P. de Bathe, Francis Home, \* and Henry Fauntleroy might be restrained by injunction from selling or disposing of any part of the principal of the trust funds, or if the Court should be of opinion that the settlement was not a valid and binding settlement, and that Mr. and Mrs. Derbshire were entitled to receive any part of the principal of the trust funds or the pro-

ceeds thereof, then that, after raising and paying out of the trust funds the sum of 3500*l.* to Mr. and Mrs. Derbishire, a proper settlement might be made of the remainder of the trust funds, according to the aforesaid proposal and offer of Mr. and Mrs. Derbishire, such new settlement to be approved of by one of the Masters of the Court. All the defendants to this bill, except Sir William P. de Bathe (who was then abroad out of the jurisdiction), appeared and put in their answers, the same solicitors acting for all the parties; and all the answers were put in without oath, but were signed by the several defendants. These answers admitted the several statements in the bill, but Mr. and Mrs. Derbishire, who answered separately, denied the validity of the settlements, and stated that it was not intended to be binding upon Mrs. Derbishire. By a decree made in the suit, dated the 20th of June, 1822, it was referred to the Master to inquire and state to the Court whether any debts of Sir John Stuart remained unpaid on the 20th of November, 1818, which were a charge upon his assets and payable thereout. And it was ordered that the Master should inquire and state to the Court whether Mr. Derbishire was of the age of twenty-one years when the settlement was executed by him.

Sir Hildebrand Oakes died in the month of September, 1822. The defendants Charles Hoare and Charles Merrick were his legal personal representatives.

\* The Master, by his report, dated the 14th of May, 1823, \* 98 after finding that there was no debt of the "intestate" Sir John Stuart which remained unpaid on the 20th of November, 1818, which was a charge upon his assets and payable thereout, except a debt of 140*l.* which had been paid by Mr. Derbishire, found that Mr. Derbishire was not of the age of twenty-one years at the time of executing the settlement. Upon the cause coming on for further directions, on the 27th of November, 1823, it was declared that the settlement was not binding on Mr. Derbishire; and—Mr. Derbishire by his counsel submitting (on receiving and being paid out of the trust funds mentioned in the indenture of settlement the sum of 3500*l.*) to confirm the settlement, or to make and execute such settlement of the remainder of the trust funds (after payment of the costs of the suit) as the Court should direct—it was ordered to be referred to the Master to tax all parties their costs of the suit relating to the settlement thereinafter directed to be approved of by the Master as between



solicitor and client. And it was ordered that William P. de Bathe, Francis Home, and Henry Fauntleroy, the surviving trustees of the indenture of settlement, should be at liberty to sell so much of the trust funds as would be sufficient to raise the sums of 140*l.* and 3500*l.*, and what should be taxed for such costs. And thereout it was ordered that the defendants should pay the sum of 140*l.* to Mr. Derbshire, and retain and pay all parties their costs when taxed; and thereout also it was ordered that the defendants should retain the sum of 3500*l.*, subject to the inquiry thereafter directed, and the further order of the Court. The order then contained the usual directions for the separate examination of Mrs. Derbshire by commission, as to the disposition of the sum of

3500*l.* And it was ordered to be referred to the Master to  
 \* 94 approve of a proper \* settlement to be made of the remainder of the trust fund upon Mr. and Mrs. Derbshire, and the issue of their marriage, and to appoint proper persons to be trustees of the settlement.

Mrs. Derbshire, being examined, expressed her desire that the sum of 3500*l.* to which she was entitled as administratrix and sole next of kin of Sir John Stuart, deceased, or the securities on which the same or any part thereof had been placed, should be paid, transferred, or assigned to Mr. Derbshire; and accordingly, by an order of the 22d of January, 1824, it was ordered that the sum of 3500*l.*, or the securities on which the same or any part thereof had been placed out, should be paid, assigned, or transferred to him.

The sums of 140*l.* and 3500*l.* were paid according to this order, and a new settlement was approved of by the Master, and executed by the parties thereto. It bore date the 1st of June, 1824, and was made between Mr. and Mrs. Derbshire, of the one part, and Jabez Mackenzie, William P. de Bathe, Francis Home, and Henry Fauntleroy, of the other part. It recited that the negroes had been sold, and produced the sum of 3500*l.*, which had been invested in the purchase of 4869*l.* 11*s.* 3*d.* 3*l.* per cent consolidated bank annuities in the names of the trustees; and that William P. de Bathe, Francis Home, and Henry Fauntleroy, in obedience to the order of the 27th of November, 1823, and the Master's report of the 31st of May, 1824, had sold out 1326*l.* 15*s.* 8*d.* East India stock, part of the trust moneys and securities which had produced the sum of 3927*l.* 5*s.* 6*d.*, and they had thereout that day paid to

Mr. Derbishire the two sums of 140*l.* and 8500*l.* as he did thereby admit and acknowledge, and had also paid the costs of the suits \* and broker's charges, and there was then standing in \* 95 the names of the trustees the sum of 561*l.* 4*s.* 4*d.* East India stock, and 13,420*l.* 2*s.* 6*d.* 3*l.* per cent consolidated bank annuities. The witnessing part declared that William P. de Bathe, Francis Home, and Henry Fauntleroy, would with all convenient speed transfer the sum of 561*l.* 4*s.* 4*d.* East India stock and the sum of 13,420*l.* 2*s.* 6*d.* 3*l.* per cent consolidated bank annuities into the names of Jabez Mackenzie, William P. de Bathe, Francis Home, and Henry Fauntleroy, and that until the transfer thereof William P. de Bathe, Francis Home, and Henry Fauntleroy, their executors, administrators, and assigns, and from and after such transfer, they, Jabez Mackenzie, William P. de Bathe, Francis Home, and Henry Fauntleroy, their executors, administrators, and assigns, should stand possessed of and interested in the above trust funds, upon trusts for transposing and varying the investment thereof, and for standing possessed of and interested in all the trust stock, funds, and securities, and the dividends, interest, and annual produce thereof, upon the trusts thereafter expressed, being trusts to pay the income during the joint lives of Mr. and Mrs. Derbishire, as she should (but not by way of anticipation) direct or appoint, and in default of appointment for her separate use; and after the decease of either of them Mr. and Mrs. Derbishire to pay the income to the survivor for life, and after the decease of the survivor to stand and be possessed of the capital, in trust for the children of Mr. and Mrs. Derbishire, as they during their joint lives, or the survivor, should appoint; and subject to such appointment, in trust for all the children equally who being a son or sons should attain the age of twenty-one years, or being a daughter or daughters should attain that age or be married.

\* In the year 1829, Sir W. P. de Bathe and F. Home \* 96 transferred the sum of 561*l.* 4*s.* 4*d.* East India stock into the names of F. Home, Sir F. W. Drummond, and George Battcock, but the sum of 8550*l.* 11*s.* 3*d.* 3*l.* per cent consolidated bank annuities was never transferred out of the names of Sir H. Oakes, Sir W. P. de Bathe, F. Home, and H. Fauntleroy.

On the 16th of September, 1824, a commission of bankrupt issued against William Marsh, Josias Henry Stacey, and George Edward Graham, the partners of Henry Fauntleroy, and on the

29th of October, 1824, another commission of bankrupt issued against Henry Fauntleroy. They were all found bankrupt, and the two commissions were consolidated.

In the month of November, 1824, Fauntleroy was executed for felony, and he died an uncertificated bankrupt and wholly insolvent.

After the death of Fauntleroy, Sir W. P. de Bathe and F. Home proved for 3500*l.*, part of the produce of the negroes, against the estate of the bankrupts under the bankruptcy, but they never in any manner proved or attempted to prove against the estate for any other sum of money.

A first and second dividend of three shillings and fourpence each in the pound in respect of the debt so proved, amounting in the whole to the sum of 1166*l.* 18*s.* 4*d.* were received by Sir W. P. de Bathe and F. Home previously to the 22d of December, 1829, and the sum of 855*l.* (part thereof) was invested by them Sir W. P. de Bathe and F. Home in the purchase of 1000*l.* 3*l.* per cent consolidated bank annuities.

\* 97     \* *The Solicitor-General, Mr. Daniell, and Mr. Southgate,* were for the appellants.

*Mr. Teed and Mr. Roche* were for the defendants Home and Battcock. — They referred to 2 Spence on the Jurisdiction of the Court of Chancery, 765, *Savage v. Foster*, (a) *Evans v. Bicknell*, (b) *Jones v. Kearney*, (c) *Jackson v. Hobhouse*, (d) *Jones v. Smith*, (e) *Bond v. Hopkins*, (g) *Hovenden v. Lord Annesley*, (h) *Beckford v. Wade*, (i) *Fenwick v. Greenwell*. (k)

*Mr. Chandless and Mr. Hallett*, for the defendant De Bathe, referred to *Bonser v. Cox*, (l) *Young v. Mackintosh*, (m) *Fowler v. Reynal*, (n) *Hearle v. Greenbank*, (o) *Ryder v. Bickerton*, (p) *Evans v. Bicknell*, (q) *Baggett v. Meux*. (r)

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| (a) 9 Mod. 36.         | (k) 12 Bea. 412.                      |
| (b) 6 Ves. 174.        | (l) 6 Bea. 110.                       |
| (c) 1 Dr. & War. 134.  | (m) 13 Sim. 445.                      |
| (d) 2 Mer. 483.        | (n) 2 De G. & S. 749.                 |
| (e) 1 Phil. 244.       | (o) 3 Atk. 712.                       |
| (g) 1 Sch. & Lef. 429. | (p) 3 Swans. 80, n.                   |
| (h) 2 Sch. & Lef. 607. | (q) 6 Ves. 174.                       |
| (i) 17 Ves. 87.        | (r) 1 Coll. 138; S. C., 1 Phill. 627. |

*Mr. Malins, Mr. Craig, and Mr. Hoare* were for the defendants Messrs. Hoare.

*Mr. Wigram and Mr. Sandys* were for the representatives of Mr. Mackenzie.

*Mr. Campbell* was for Sir O. Gordon.

*The Solicitor-General*, in reply.

\* THE LORD JUSTICE KNIGHT BRUCE. — The appeal of \* 98 which we have to dispose is that of the sole plaintiff, Mrs. Derbyshire, who complains of part only of the decree. There is no other appellant. The appeal has been resisted by various respondents, who have between them scarcely suggested, and none of whom has in effect asked, that the decree should be in any respect altered. Some defendants in the cause have not appeared upon the appeal.

The chief or sole object of the plaintiff's pursuit is the price or value of some slaves formerly the property of a distinguished officer, the late Sir John Stuart, her uncle, and especially a sum of 3500*l.*, produced by a sale, whether valid or invalid, of those slaves, or some of them, that took place in the year 1819, and received in the same year by the late Mr. Fauntleroy, or the sum of 4869*l.* 11*s.* 3*d.* 3*l.* per cent bank annuities, in the purchase of which he untruly alleged the 3500*l.* to have been invested: the appellant contending that at least with one of those sums, and with interest or income for a considerable time in respect of it, she is entitled to charge the defendants Colonel Home, Sir William de Bathe, and Mr. Battcock, and the estates of Sir Hildebrand Oakes, Colonel Mackenzie, and Sir Francis Drummond, deceased, who are represented respectively by other defendants.

That there are difficulties in the way of this claim as to one and all of the persons and estates sought to be subjected to it, has scarcely been denied by her counsel, who maintain, however, that these difficulties are not insurmountable, and are, unless perhaps as to Colonel Mackenzie, surmounted. And the main question is, whether the plaintiff's counsel have established this proposition. \* Now upon the pleadings and evidence it appears to \* 99 me that the plaintiff must, for every purpose of the cause, be

taken to have been before and at the time of her marriage, and continually afterwards, well aware and in the possession of a full recollection of her husband's age, Sir John Stuart's will, its nature and contents, and the fact of the letters of administration of his effects having been granted to her with that will annexed. She had attained majority some years, or certainly a year, before her marriage. For if not born, as *Mr. Teed* declares that she was, before the year 1788, she must be taken to have been at least twenty-one years of age when the letters of administration were, in the year 1815, granted to her; and the marriage (for three years or more after which her husband seems to have been a minor) took place in 1817. It is, perhaps, not too much to say, that merely by so marrying without any previous settlement, without any previous act to secure or protect Sir John Stuart's property against the consequences of such a step, she committed a breach of trust. But however that may be, does it appear, or is it a legitimate inference from the pleadings and evidence, that previously to the year 1821 Sir Hildebrand Oakes, Colonel Home, and Sir William de Bathe, or any one of them, knew or had notice that when the deed of 1818 was executed by any person who did execute it, or when Mr. Fauntleroy received the 3500*l.* paid to him by the plaintiff's husband in the year 1819, the plaintiff's husband was a minor? This question I mention that I may not seem to have forgotten it; though, not considering it important to be answered, I do not answer it.

But, again, does it appear, or is it a legitimate inference from the pleadings and evidence, that previously to Mr. Fauntleroy's \*100 bankruptcy or death, or previously \*indeed to the year 1848, the six alleged trustees (in using which expression I mean Sir H. Oakes, Colonel Home, Sir W. de Bathe, Colonel Mackenzie, Sir F. Drummond, and Mr. Battcock, of whom the two last were appointed, or professed to be appointed, not until 1829), or any one of them, knew, or for any purpose or in any sense, material in this cause had notice, of Sir John Stuart's will, or of the fact that the plaintiff was administratrix of his effects, not simply, but with a will annexed? This question must, in my opinion, be judicially answered in the negative. I assume it to be true that in some suits, and for some purposes, notice of a person being administrator of a man deceased is notice also constructively of the fact, if true, that the letters of administration are letters of administra-

tion with a will annexed, and notice therefore, constructively, of its contents. But the present, in my opinion, is not such a suit, nor do I think the purpose under consideration here such a purpose.

The plaintiff must be taken in substance and effect to have, during the whole time material for us now to consider, represented uniformly to the alleged trustees for the time being that her uncle, Sir John Stuart, had died intestate, and that at the time of her marriage she was beneficially the absolute owner of his property; and I conceive that, as against her at least, each of the six alleged trustees had a right to trust to the fact being so, was entitled to believe it, was justified in acting upon that footing. The will, however, did in truth, and does bind the property in question. Whatever the age of the plaintiff's husband, neither he nor she rightly did, or rightfully could, defeat or contravene its trusts or dispositions. But the husband and wife have so acted as to rob the testator after his death, by robbing their \* chil- \* 101 dren of 7000*l.*, or so much of that sum as the proof under the bankruptcy of the bankers shall not have been the means of effectually making good to those children: to say nothing of the heavy costs of the amicable suit,—a suit amicable in one sense,—but which may also deserve another designation. For by the improper receipt of the first sum of 3500*l.*, and its improper payment to Mr. Fauntleroy, it has wholly, or in great part, been lost; and by the deception practised on the Court, in concealing the will from it throughout that suit, the second sum of 3500*l.* was in fact fraudulently obtained, though of all participation in making the payment of 1819, and of all connection with the fraud, each of the six alleged trustees is, I think, clearly entitled to be acquitted; nor do I impute fraud to the solicitors concerned in the amicable suit, who (to borrow a phrase from the present bill) unaccountably suffered themselves to be kept in ignorance of the true nature of the letters of administration,—an ignorance exposing them not only to much observation, well or ill merited, but possibly to other consequences also. Both the settlements are in contravention of the will, and so far void. Independently of the material fact, that the will does not contain any power of appointing new trustees, or a single new trustee, the testator did not suppose or contemplate that the plaintiff, or any person whom she might marry, would be a trustee, still less, solely the trustee of it. There never

has been a due or proper, there never has been an effectual appointment of new trustees, or a single new trustee of the will. Not one of the six alleged trustees, therefore, was at any time entitled to intermeddle with any portion of the property of Sir John Stuart, at least with any portion of the capital of it. Any act of interference with the capital, by any one of them, after actual notice of Sir John Stuart's will, could not but be a

\* 102 breach of trust towards the plaintiff's children.\* And how can ignorance of the true state of the case—in point of fact, an ignorance as to which the plaintiff was and is mainly if not solely to blame—render any one of the six alleged trustees liable to her? How can a justifiable omission to act be rendered unjustifiable by not having been known to be so justifiable, as it was? The statement of Sir H. Oakes and Colonel Home with respect to the imaginary bank annuities in the amicable suit has deserved certainly, and has received from myself, and I believe from the Lord Justice TURNER, great attention in this cause. But the answer on their part at least was, I am persuaded, though careless and imprudent, an honest answer. It may have helped possibly, in 1822 and 1823, to mislead the Court, but of it the plaintiff in the present litigation is alone now complaining, and she assuredly, in my judgment, is entitled neither equitably nor morally to complain.

Again, at what a distance of time from that at which every material fact was fully known to the plaintiff has she instituted this cause! Her original bill was filed not before the year 1848. But she was aware previously to the year 1826, of every circumstance on which that part of her case with which I am now dealing necessarily rests. She rebuts, or attempts to rebut, any defence founded on this delay, by the circumstance of the prohibition from anticipation, contained perhaps in the will (though that I do not assert), but certainly expressed in the two settlements. That the defence grounded on the length of time between the year 1825 and the commencement of this litigation can so, or at all, be met successfully, I am not satisfied; but there is too much else in the case to render it, in my opinion, necessary to decide the point. The

will, and the true nature of the letters of administration,  
\* 103 coupled with the \* age of the plaintiff's husband, her unfair course of conduct, and the good faith of the six alleged trustees, are sufficient, in my opinion, to exclude her from all title to

allege successfully, in this cause, that there was on the part of any one of the six alleged trustees any default, or any breach of trust as to the slaves, or as to the 3500*l.* paid to Mr. Fauntleroy, or as to the fictitious bank annuities.

The plaintiff having, by her counsel at the bar, waived all relief as to any past income of the still remaining India stock, and of the 8550*l.* 11*s.* 3*d.* bank annuities also saved (a waiver which ought, I suppose, to be entered in our order), and no relief having been (if any could in this cause rationally have been) asked as to the East India stock which by means of the amicable suit the Court was made the instrument of abstracting from Sir John Stuart's estate for the benefit of the plaintiff's husband and for costs, there remains but a single object of the present suit to deal with. It is of course one which my observations already made were not intended to include or refer to; namely, the produce of the proof made under the bankruptcy of Marsh & Co. It being or having been contended by the plaintiff, that whatever the view proper to be taken of the greater and higher claim made by the bill, some of the defendants (including defendants wholly dismissed by the Vice-Chancellor) ought at once to be charged on this account. Possibly in the result some of the defendants may be made accountable, and charged in respect of that produce. But circumstanced as the case is, justice and convenience will (I agree with Sir James Parker in thinking) be better consulted by postponing at least any enforcement or declaration of liability, than by now charging any person upon the score of the proof. The Vice-Chancellor was, I think, right in directing the

\* inquiries which, with liberty to state any circumstances \* 104 specially, he did concerning its produce. Whether the execution of these inquiries should have been deferred until ascertaining who are, or at the time of filing the original bill were, the persons beneficially interested in the produce of the proof, if that ought to be considered obscure or uncertain, is a different point, which was scarcely or not at all touched in the argument.

The inquiries concerning "any assignment, charge, or other incumbrance," would probably have better been wholly omitted as to the plaintiff's husband, who really never had any interest in his own right, and perhaps also as to the plaintiff. But that he is stated to be the administrator of two adult children of the marriage, and she may have done some acts or act to affect arrears



of income, if any now due, the decree may, I think, well be taken as not admitting the possibility that she can otherwise, since the first marriage settlement, or at least since the second, have assigned, charged, or incumbered. And with respect at least to her children, these inquiries should in strict propriety either have been omitted or have been preliminary, as I proceed to state.

The inquiries relating to the produce of the proof under the bankruptcy are, I repeat, as I conceive, right and sufficient; but if any one of the parties shall desire them to be fuller or more particular, I do not myself object to any reasonable addition in this respect; though, whether extended or not extended, the execution of them ought, I suppose, in point of regularity, to have been postponed until the inquiries, if any, concerning "any assignment, charge, or other incumbrance," should have been executed; that is, until the suit should have been shown to be or

should be made sufficient, if it ought not to be now taken  
 \* 105 as certainly sufficient in point of parties \* for all the purposes of justice. Considering, however, the manner in which the petition of appeal is worded, that some of the defendants have not appeared upon it, and that none of the defendants have complained in this respect, I think that the decree may as far as this point is concerned, which seems not to have been brought under the attention of the Vice-Chancellor, remain as it is.

The bill stands wholly dismissed as against those who represent the estates of Sir H. Oakes and Colonel Mackenzie. I think this right, for Sir H. Oakes did not join in the proof under the bankruptcy, or receive, apply, or deal, or interfere with, or join in receiving, applying, or dealing, or interfering with, the produce, or any part of the produce, of that proof, whether in the shape of money, or of stock, or otherwise; and the circumstances sufficient as I have said, in my judgment, to exempt his estate from liability for the 3500*l.* received by Mr. Fauntleroy, or the stock falsely stated by him to have been bought with that sum, are also, I think, certainly sufficient to exempt Sir H. Oakes's estate from all responsibility connected with the proof, and to render, as I have said, the total dismissal of the bill, as far as his assets are concerned, perfectly correct. As to Colonel Mackenzie, he never did, alone or jointly with any other person or persons, receive or become possessed of any part of the trust property; nor did he join in the proof under the bankruptcy. And the circumstances exempting,

at least in my opinion exempting, his estate, and Colonel Home, and Sir W. de Bathe, from all liability otherwise than in respect of the proof under the bankruptcy, must, I think, exempt the estate of Colonel Mackenzie from all liability in respect of that proof or its produce. It does not seem that any party wishes an inquiry as to the number or ages of the children that the plaintiff has had.

\* I consider that the words, "And this decree is to be \* 106 without prejudice to the right of any of the parties to these suits under the will of Sir John Stuart, the testator in the pleadings named," had better be struck out, the reasons being, that the will governs the property, that much of the capital of the testator's estate is now in Court in this cause, and that the survivors of the six alleged trustees, and the representatives of the others, ought, if possible, not to be left exposed to a future suit on the subject. But there may, I think, for these omitted words be with propriety substituted this sentence, — "And this decree is to be without prejudice to any suit that may be instituted for the purpose of charging the plaintiff, or her separate estate, in respect of the 3500*l.* received by Henry Fauntleroy in 1819, or the stock alleged by him to have been purchased with that sum;" otherwise the decree on the whole must, I think, stand as it is, the waiver that I have mentioned being entered.

I have the Lord Chancellor's permission to state that — though, not having heard the argument throughout, he does not join in deciding this case — his impression, from what he did hear, is in conformity with the conclusion at which I have said that I have arrived, and with which the Lord Justice TURNER, I believe, agrees. Nor do I believe that he differs, or that the Lord Chancellor would have differed from me, in thinking that, the appeal having failed in its principal, if not only object, the subjecting, namely, of the survivors of the six alleged trustees, and the representatives of the others, to an ungracious, a harsh, a stale, and an unjust demand of considerable amount, the plaintiff's next friend ought to pay the whole costs of it.

I have not yet expressly adverted to the demand which \* the bill, whether sincerely or otherwise, asserts against \* 107 the plaintiff's husband. She may probably be thought to have so acted as to preclude herself from obtaining any relief against him in this suit, even if she wishes it (which I suspect

that she does not do); and even had her course of acting been different, she would have obtained it. But her husband, when he and she, or one of them, paid to Mr. Fauntleroy the 3500*l.* received by Mr. Fauntleroy in 1819, was a minor, and continued so throughout that year; nor do I consider that when the plaintiff's husband received the second 3500*l.* from the Court of Chancery, he was aware that the stock alleged to have been purchased by Mr. Fauntleroy with the former 3500*l.* had not been so purchased, or was not safe for the plaintiff and her children. It appears to me that in this suit there is not a case of liability established against Mr. Derbshire, and the bill should perhaps, in strictness, be in part dismissed against him; but this is of no importance, and has not been asked by him or his friendly adversary, the plaintiff.

The Lord Justice TURNER began by stating the facts nearly in the words in which they are stated above, observing during the narration that, from the correspondence with the purchaser of the slaves on the occasion of the contract of 1818, it was clear that, at the date of the contract, the plaintiff was fully aware, and had in her immediate recollection, the will of Sir John Stuart. After concluding the statement of the facts, his Lordship said:—

The first question appears to me to be, whether Fauntleroy was authorized or permitted by his co-trustees to receive the 3500*l.*, and I think the evidence does not warrant even a suspicion that he was. It is, I think, clear, from the fact of the settlement \* 108 having purported \* to assign the slaves, that all knowledge of the agreement by which the slaves had been contracted to be sold was withheld from the trustees, and it was under this agreement that the 3500*l.* became payable. The co-trustees could not therefore have authorized or permitted Fauntleroy to receive this sum, unless they became aware of the agreement for sale between the date of that instrument and the period when Fauntleroy received the money; and I find no proof whatever that this was the case. The plaintiff's case, therefore, wholly fails as to authority or permission, and the true question is, whether there is a sufficient case to charge the trustees with neglect or default.

In order to determine this question, it is material, I think, in the first place, to consider by whom and upon what trusts the slaves and the proceeds of them ought to have been and ought now

to be held ; and upon this part of the case no doubt can, I think, be entertained. These slaves were part of the property of Sir John Stuart, and were subject to the trusts of his will, and barring any power which there may have been to deal with them for the payment of debts, for which purpose it is clear that they were not, and were not required to be dealt with, there was no power whatever to discharge them from those trusts. In the event of Mrs. Derbshire's death under twenty-one without children, they were to be enjoyed in specie by some of the devisees in remainder, and they could not therefore be subject even to the ordinary equity for conversion, if property of this nature be subject to such an equity. Again, the will of Sir John Stuart did not contain any power for the appointment of new trustees, and there was no authority, therefore, short of the power of this Court, which could warrant their being vested in any other trustees than those whom the testator had named. It is clear, therefore, that these slaves \* ought to have been held upon the trusts of Sir \* 109 John Stuart's will: the trustees appointed by him, having declined to act, ought to have been held by Mrs. Derbshire upon those trusts until new trustees of them were duly appointed by the Court.

This being the position of the case as to the slaves at the death of the testator, we have next to consider the mode in which they were dealt with. In the year 1817 Mrs. Derbshire married the defendant H. G. Derbshire, then an infant, and on the 19th of November, 1818, she and her husband, who was then still an infant, in direct breach of the trusts created by Sir J. Stuart's will, entered into an agreement for the sale of the slaves to a gentleman of the name of Wood, for the sum of 4000*l.*, and it is to be observed that in this agreement Mrs. Derbshire is described as the niece, residuary legatee, and administratrix, with the will and codicil annexed, of Sir John Stuart; and her will is recited in the agreement as constituting Mrs. Derbshire residuary legatee, subject to certain limitations and restrictions therein fully stated. It is further to be observed, that Mrs. Derbshire, in her letters of this date, refers to the will. It is, clear, therefore, that the will was at this time present both to her mind and to the mind of her husband; but, notwithstanding this full knowledge of the will, she and her husband on the following day execute a post-nuptial settlement, which is purely voluntary, by which they recite that the defendant

H. G. Derbyshire is entitled to these slaves in right of his wife, and the slaves are purported to be assigned to the trustees, who, and whose estates, are sought to be charged in this suit, upon trusts to sell the same and to stand possessed of the proceeds, upon trust for Mrs. Derbyshire for life, without power of anticipation, with remainder to Mr. Derbyshire for life, with remain-

\* 110 der to the children of the marriage, with \* remainder to Mrs. Derbyshire, appointment by will, and in default of appointment, to the husband absolutely, — trusts, therefore, which essentially vary from those created by Sir J. Stuart's will.

Now at this point of the case we part with the slaves in their character of slaves; and it may be convenient therefore to pause and consider what was the position of the trustees under this settlement, and whether, if nothing further had been done, the trustees could have been made liable under the settlement, and by whom and to what extent. Much was said in the argument upon the validity of this deed, — upon the deed of an infant being voidable and not void, and upon the deed being beneficial to the infant. I have difficulty in understanding how it could be beneficial to the infant to concur in a breach of trust, or in what, in the eye of this Court at least, would amount to a fraud.

But I do not think it necessary to pursue this question. The case may be dealt with on the footing of the settlement having been effectual to vest in the trustees the property in the slaves. What, then, would have been their position? Either the slaves passed by delivery, or they did not; if they passed by delivery, the delivery under the previous contract entered into by Mr. and Mrs. Derbyshire would have defeated the sale by the trustees; if they did not pass by delivery, it would have been necessary for the trustees, when they proceeded to sale under the trusts of the settlement, to make out their title, and upon their attempting to do so it would have appeared that they derived under a breach of trust. In neither case, therefore, could the trustees have made an effectual sale; and how, then, could they have been charged with the proceeds of the slaves, when they could not by any means have realized them?

\* 111 \* This being the state of the case as to the slaves themselves, it is next to be considered how the case stands as to the proceeds of them. In the year 1819 a bill of exchange for 3500*l.*, part of the purchase-money for the slaves, was remitted

from Jamaica, and reached the hands of the defendant, H. G. Derbishire, by whom this bill alleges — and I think, upon the evidence in this cause, it must, as to some at least of the defendants, be assumed — that that sum was paid over to Fauntleroy upon the trusts of the settlement. Was there, then, neglect or default on the part of the co-trustees in not seeing to the investment of this money in the hands of Fauntleroy? Now, Fauntleroy had no right to receive this money on account of the trustees. He could not receive it on their account without adopting the sale which had been made by Mr. and Mrs. Derbishire, and he had no authority from his co-trustees to make that adoption; nor does it appear that the co-trustees knew of the sale until some time in the year 1821. Up to that time at least, therefore, I think that there was no neglect or default on the part of the trustees. The inquiry, therefore, upon this point must be limited to what subsequently occurred; and on pursuing this inquiry, I think it will be found that there is nothing subsequently occurring on which the trustees could be charged. The defendant, H. G. Derbishire, had then attained twenty-one, and he disputed the validity of the settlement. A bill was filed in this Court for the purpose of enforcing it, and this Court declared the settlement to be void. The position of the trustees, therefore, during this period was, that their title was disputed, and was ultimately declared to be invalid; and surely it cannot be maintained that the trustees can be charged with default for not having insisted on such a title.

It was much relied on, however, upon the part of the \* plaintiff, that the trustees had in this former suit admitted \* 112 the receipt of the 3500*l.*, and the investment of it in their names upon the trusts of the settlement; and no doubt this part of the case might have been material had this bill been filed to charge the trustees with the 3500*l.* paid to the husband under the decree in that suit. The trustees might or might not have been able in such a suit to explain away or escape from the effect of their admission. They might or might not have been held entitled to relief against the admission, upon the principles of those cases in which this Court has relieved executors from the consequences of mistaken admissions; but this bill does not seek to charge the trustees in respect of the 3500*l.* paid to the husband. It seeks to charge them only in respect of the proceeds of the slaves, and I do not see how their admission of the receipt and investment of the

money can bear upon the charge of wilful neglect or default. The utmost which could be said upon that subject, as it seems to me, would be, that if the trustees had not made the admission, the fact of the receipt and of the non-investment might have been discovered. But suppose that it had been discovered, the title of the trustees would not in any respect have been improved. The Court must equally have declared that the settlement was void against the husband, and the trustees could not have recovered the fund; and if they could not have recovered the fund, they could not, as I apprehend, be charged with it.

This state of the case continued down to the date of the settlement of 1824. It remains, then, only to consider whether the trustees can be charged for neglect or default in the interval between that date and the bankruptcy of Marsh & Co. I am of opinion that they cannot. Sir William de Bathe, one of the trustees, was then at Malta, and a power of attorney for the

\* 118 \* transfer of the stock was sent out for his execution, so that the proper steps were taken to get in the stock, had it existed; and had its non-existence been discovered, it is clear that it could not then have been recovered. In my opinion, therefore, this bill, so far as it sought to charge the trustees with the 4869*l.* 1*l*s. 3*d.* consols, or the 3500*l.*, was most properly dismissed, with costs against the parties against whom it was in that respect dismissed.

In arriving at this conclusion, I have dealt with the case in the view most favourable to the plaintiff. There are many other grounds which might have been called in aid of the conclusion at which I have arrived, had it been necessary to resort to them. One question would be, whether the fetter upon alienation could protect this lady against the rules of this Court as to lapse of time and acquiescence. I much doubt this: that fetter is imposed for her protection against her husband; it prevents her from disposing of her interest; but I am not prepared to say that it exonerates her from the obligation of asserting within a reasonable period any claim which she may be entitled to advance. There is, I think, strong ground to contend that, as a Court of Equity creates and models the separate estate, the estate so created and modelled must be subject to the ordinary rules of the Court.<sup>1</sup> It will be

<sup>1</sup> See *In re Lush's Trusts*, L. R. 4 Ch. Ap. 591, 596.

sufficient, however, to decide that question when it may become necessary to do so.

Another and, as I think, a very serious question would be, whether it is competent to a married woman who, upon a bill being filed in this Court for the purpose of effectuating a settlement purporting to be made by her and her husband, has, as this lady has done, put in a separate answer alleging that that settlement was made \* upon an understanding that it was \* 114 not to be binding upon her, — whether it is competent to her afterwards to turn round and attempt to charge the trustees upon the footing of their not having acted upon the trusts of the very instrument the binding effect of which she has thus repudiated.

A third and even more serious difficulty in the way of this plaintiff would be, that the trust under which she seeks to charge these trustees was wrongfully created by her; that she concealed from the trustees the wrongful creation of it; and that she is now seeking to charge the trustees under a trust which, if she had divulged the true state of the case, they in all probability never would have undertaken. In truth, having deceived the trustees, she is endeavouring to charge them for default, in not having carried into full effect the deception which she has herself practised.

There remain to be considered only the question as to the dividends on the proof against the estate of Marsh & Co., and one or two questions which are of very minor importance. After looking into the pleadings in this case, I am satisfied that no decision upon that part of the case which relates to the dividends upon the proof could now be safely pronounced, and that the decree of the Vice-Chancellor, directing inquiries on that subject, with liberty to state special circumstances, is best calculated to work out the justice of the case in this respect. I think, also, that the inquiry as to the incumbrances must be retained. It was objected that there should have been a decree against the husband as to the stock, but it appears that he was an infant when he received the 3500*l.* and paid it over to Fauntleroy; and if it be said that he was chargeable upon the ground of fraud, the plaintiff was herself a party to the fraud. A further \* objection was made to the \* 115 decree, upon the ground that the representatives of Mackenzie were wholly dismissed.

Although the case against them as to the capital of the stock



was given up, it was said that Mackenzie's estate was chargeable in respect of a sum of 150*l.*, part of the dividends upon the proof against Marsh & Co., but this sum was never received by Mackenzie; and the same principle which applies to the other trustees as to the capital of the stock, applies to Mackenzie as to this sum. I think, therefore, this part of the decree is right. In one respect, however, we have thought that the decree should be altered. It is expressed to be made without prejudice to the rights of any of the parties under the will of Sir John Stuart. We think it should be without prejudice to any suit that may be instituted against the plaintiff, for the purpose of charging her, or her separate estate, in respect of the 4869*l.* 11*s.* 3*d.*, or the 3500*l.* mentioned. This, however, is a matter which does not affect the costs of the appeal. The appellant must pay the costs.

\* 116

\* *Ex parte* ELIZABETH HAKEWILL.

In the Matter of HAKEWILL, an Infant.

1853. February 23. April 16. Before the LORDS JUSTICES.

A mother of an infant under seven years of age, not living apart from the father, but prevented by him from having access to the infant, was permitted, on application being made *ex parte* for that purpose, to present a petition under 2 & 3 Vict. c. 54, in *formâ pauperis*, without a next friend, and without payment of the stamp of 1*l.* required by the orders of the Court.<sup>1</sup> And *held*, that, upon such an *ex parte* application, it was no improper suppression to forbear stating that the intended petitioner had relatives in good circumstances, it not being shown that any of them would have been willing to act as her next friend.

THIS was a motion *ex parte*, on behalf of Mrs. Elizabeth Hakewill, a married woman, for leave to present a petition *in formâ pauperis*, and without a next friend, the object of the petition being to obtain under the Act 2 & 3 Vict. c. 54, an order for access to some of the petitioner's children, and for the custody of those under seven years of age. It was further moved that the

<sup>1</sup> 1 Dan. Ch. Pr. (4th Am. ed.) 39, 111, 1861, 1863; Page v. Page, 16 Beav. 588.

petition might be received without the stamp of 1*l.* required by the general order of the Court of the 25th of October, 1852.

In support of the motion, Mrs. Hakewill made an affidavit that she was not worth 5*l.* exclusive of her wearing apparel, and that she was not possessed of, and was unable to obtain from her husband or any other person, the sum of 1*l.*, which, as she was informed, was a sum necessary to be paid upon filing her petition, and that she was wholly unable to procure any person by whom, as her next friend, she might present her said petition; that she and her husband had separated, and that after the separation she had sued for and obtained a decree for restitution of conjugal rights in the Ecclesiastical Court, and that her husband had thereupon taken a house at a distance from his ordinary residence, and had assigned her a separate apartment in it, but had never visited her; that he had made an application \* to the \* 117 Ecclesiastical Court to stay proceedings, but that his application was refused, on the ground that he had not complied with the sentence of the Ecclesiastical Court.

*Mr. C. M. Roupell*, in support of the motion, cited *Wellesley v. Wellesley (a)* and an unreported case of *Ex parte Page*, before the Master of the Rolls, 11th January, 1853.

The order was made.

April 16.

On this day a motion was made, upon notice, on behalf of the husband, to discharge or vary the order.

In support of this motion, an affidavit was read, to the effect that Mrs. Hakewill had a father, two brothers, a sister, and a brother-in-law, all in good circumstances, and any one of whom would have been competent to act as her next friend.

*Mr. Glasse*, in support of the motion.

The facts now disclosed were concealed from the Court upon the former application, and as the order was made *ex parte* in such circumstances, it ought to be discharged.

[THE LORD JUSTICE TURNER. — But the affidavits now made do not show that any one of Mrs. Hakewill's friends was willing to act as her next friend.]

Still I submit that Mrs. Hakewill ought to have stated the  
\* 118 facts of the case to the Court, and to have \* shown that she had applied to her friends, and that they had refused to act.

*Mr. Wilcock* and *Mr. C. M. Roupell*, for Mrs. Hakewill, were not called upon.

The Lord Justice KNIGHT BRUCE said, that it did not appear that any part of Mrs. Hakewill's affidavit had been untrue, and his Lordship thought that no sufficient ground was shown for the present motion.

THE LORD JUSTICE TURNER. — The lady's affidavit appears to me to be wholly uncontradicted, nor does it appear that the husband's affidavit alleges that any of the lady's friends would have consented to act as her next friend. The case might have been different, if, from the affidavits now filed, it could have been shown that had there been an application to her relations, one of them would have been willing to act for her as her next friend. Nothing of that sort is shown.

Motion refused, costs reserved.

1853. February 28. Before the LORDS JUSTICES.

Where a foreclosure suit was instituted before the 15 & 16 Vict. c. 86, and stood over, in order that the *cestuis que trustent* under the mortgagor's will might be made parties, *held*, that, after the Act came into operation, the suit might proceed in their absence, the trustees and executors of the mortgagor representing them sufficiently.<sup>2</sup>

<sup>1</sup> S. C., 17 Jur. 170; 10 Hare, Ap. 50.

<sup>2</sup> See *Wilkins v. Reeves*, 3 W. R. 305; *Marriott v. Kirkham*, 3 Giff. 536; 8 Jur. N. S. 379; 1 Dan. Ch. Pr. (4th Am. ed.) 215, 257.

THIS was an application under the Chancery Amendment Act, 15 & 16 Vict. c. 86, to dispense with the necessity of making certain *cestuis que trustent* parties to a suit. The suit was instituted, by way of claim, by the devisees and executors of a mortgagee, against the beneficial devisees of one moiety, and against the devisees in trust of the other moiety of the equity of redemption, the latter of whom were also the executors of the mortgagor.

The claim came on to be heard before the 15 & 16 Vict. c. 86, came into operation, and was ordered to stand over, with leave to amend, by making the *cestuis que trustent* of the moiety devised upon trust, parties to the suit. After the statute came into operation, the claim was set down again for hearing without amendment, but the Vice-Chancellor STUART requested that the point of practice might be submitted to the consideration of this branch of the Court.

*Mr. Elderton*, for the plaintiff, referred to rule 9 of the 42d section of the Act, and to *Goldsmid v. Stonehewer*, (a) and *Hanman v. Riley*. (b)

THE LORD JUSTICE TURNER. — Both my learned brother and myself are of opinion, that as all the persons having control over the property—the devisees of one moiety, and the trustees of the other moiety, and the executors of the mortgagor—are parties, the claim may with propriety be heard without the *cestuis que trustent* being made parties.

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\* THE INCORPORATED SOCIETY FOR PROMOTING \* 120  
THE ENLARGEMENT, BUILDING, AND REPAIR-  
ING OF CHURCHES AND CHAPELS v. BARLOW.

1853. March 7 & 8. Before the LORDS JUSTICES.

The Incorporated Society for promoting the Enlargement, Building, and Repairing of Churches and Chapels, one of the objects of which is, by its Act of incorporation, defined to be to grant funds towards enlarging or building churches

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(a) 9 Hare, App. 1, p. xxxviii.

(b) *Ib.* xl.

and chapels, has no power to purchase land, and therefore a bequest of pure personalty to this society is not within the Mortmain Act.<sup>1</sup>

THIS cause came on on further directions, and was heard by their Lordships for Vice-Chancellor KINDERSLEY. John Brown, of Sudbury Hill House, the testator in the cause, by his will, dated in 1846, after making various bequests, including four pecuniary legacies to charitable institutions, gave and bequeathed as follows : "Unto the Society for building Churches, such a sum of money as shall be equal to the price or value as aforesaid of 5500*l.* 8*l.* per cent reduced bank annuities. And I declare and direct that the said five several sums of money shall be paid at the end of three calendar months next after my decease, or at such earlier or later period as my said executors shall, in their uncontrolled discretion, think fit, to the treasurer or trustee or treasurers or trustees, or any one or more of them, at the option and discretion of my said executors, of the same charitable institutions." And the testator charged the above legacies wholly and entirely upon, and directed the same to be paid wholly and entirely with and out of, such part only of his personal estate as could or might be by law charged with, and applied in payment of such legacies.

At the original hearing, it was referred to the Master to inquire and state what society was meant by the words "Society for building Churches." The Master found the society to be "The Incorporated Society for Promoting the Enlargement, Building, \* 121 and Repairing of Churches \* and Chapels;" being a corporation created under the provisions of the Statute 9 Geo. 4, c. 42, intituled "An Act to abolish Church Briefs, and to provide for the Better Collection and Application of Voluntary Contributions, for the Purpose of Enlarging and Building Churches and Chapels."

By the fourth section of this Act it is enacted, that the society shall be governed by a committee. By the seventh section, the committee are empowered to make all such laws and regulations, not being repugnant to the laws of the kingdom or to the express powers of the Act, as to them shall from time to time seem expedient, for the management and government of the society, and for

<sup>1</sup> See 1 Jarman Wills (3d Eng. ed.), 207, 208; *Mayor, &c., of Faversham v. Ryder*, 5 De G., M. & G. 350; *Baldwin v. Baldwin*, 22 Beav. 419; *Philpott v. St. George's Hospital*, 21 Beav. 131; *Edwards v. Hull*, 6 De G., M. & G. 74.

carrying its designs into effect; and shall have the sole management, control, and disposition of the estates, funds, revenues, and other property, then, or at any future time, belonging to the society. By the eighth section the committee are directed, in the selection of the parishes and extra-parochial places to which they shall grant any part of their funds towards the enlarging or building of any churches or chapels, to have regard to the amount of population and also to the disproportion between the number of inhabitants and the present accommodation for attendance on divine service according to the rites of the United Church of England and Ireland, and, in giving preference among such parishes and extra-parochial places, they are directed to have regard to the proportion of the expense which shall be offered to be contributed or raised by such respective parishes or places towards the enlargement or building of churches and chapels, and to the pecuniary ability of the inhabitants thereof.

Among the laws and regulations of the society is one directing that all applications for aid shall be made \* accord- \* 122 ing to the society's printed forms. Another directs that no grant shall be made towards enlarging, building, or repairing of any church or chapel without previous application to the ordinary patron, and incumbent, for their consent to such enlarging, building, or repairing. Another directs that no grant shall be made unless one-half at least of the increased area and accommodation proposed shall be secured for additional free and unappropriated sittings. Another directs that no grant exceeding 500*l.* shall be made unless with such special consent as therein mentioned. Another provides that the society shall not themselves engage in building or enlarging any church or chapel; nor shall in any case, unless for some special reason, to be made out to the satisfaction of the committee, advance a greater proportion than one-fourth of the estimated expense.

*Mr. Rolt* and *Mr. Speed*, for the plaintiffs, were stopped by the Court.

*Mr. Walker* and *Mr. Bird*, for the executors. — A bequest for building churches must be taken to contemplate the expenditure of part of the money on land, and is therefore void under the pro-

visions of the Mortmain Act: *Chapman v. Brown* (a) and *The Attorney-General v. Parsons*; (b) or is so at all events, unless the testator expressly directs the money to be expended in building on land already in mortmain. *The Attorney-General v. Davies*, (c) *Pritchard v. Arbouin*, (d) *Giblett v. Hobson*. (e) Even if the bequest is to be expended on land hereafter to be brought into mortmain by others, it is void. *Attorney-General v. White-*

\* 123 *church*, (g) *Mather v. Scott*, (h) *Trye v. The Corporation of Gloucester*, (i) *The Attorney-General v. Hull*, (k) *Longstaff v. Rennison*. (l) And it is sufficient if the purposes forbidden by law fall within the scope of the bequest, although another purpose not forbidden might also fall within the terms of it. Now there is nothing in this Act incorporating the plaintiffs, or in their rules and by-laws, precluding them from employing the legacy in purchasing land. It would be blended with the general funds of the society, and might be advanced to persons who were thus employing their own funds with those advanced by the society. Indeed, the provisions of the statute, requiring the society, in making advances, to have regard to the number of the inhabitants and the existing accommodation for their attendance upon divine service, plainly contemplates the purchase of land by those who are to receive the assistance of the fund. The regulations require all applications for assistance out of the funds of the society to be made in the form prescribed by a printed paper furnished by the society. On referring to these printed forms, we find that, when filled up, they are to state the particulars of any plot of ground required for building. The Act 43 Geo. 3, c. 108, § 1, provides that bequests for or towards the erecting, rebuilding, repairing, purchasing, or providing any church or chapel not exceeding in value 500*l.*, shall, where the will is executed three months before the testator's death, be valid. This amounts to a statutory declaration that such bequests beyond that amount are void. They also cited *Widmore v. Woodroffe* (m) and *Crafton v. Frith*. (n)

*Mr. Rolt*, in reply, was stopped by the Court.

(a) 6 Ves. 404.

(b) 8 Ves. 186.

(c) 9 Ves. 544.

(d) 3 Russ. 456.

(e) 5 Sim. 651; and 3 M. & K. 517.

(g) 3 Ves. 141.

(h) 2 Keen, 172.

(i) 14 Beav. 173.

(k) 9 Hare, 647.

(l) 1 Drewry, 28.

(m) Amb. 636.

(n) 4 De G. & S. 237; 15 Jur. 737.

\* THE LORD JUSTICE TURNER. — The question in this case \* 124 is as to the validity of a legacy given to the Society for the Building of Churches, and which has been found by the Master in his report to have meant, "The Incorporated Society for Promoting the Enlargement, Building, and Repairing of Churches and Chapels." The case has been argued for the most part as if there had been a direct bequest for the purpose of building churches and chapels. There is, however, no direct bequest for any such purpose, but merely a bequest to a society incorporated for promoting the enlargement, building, and repairing of churches and chapels. Now there are several means for promoting the enlargement, building, and repairing of churches and chapels. These objects may be promoted not only by the purchase of land, but by subscribing to build upon land which has already been devoted to that purpose, and is already in mortmain. There are therefore two modes in which the society might accomplish its objects, the one legal, and the other which would involve illegal results; and there being thus two purposes, the one legal, the other illegal in its consequences, I think that the incorporation must be referred to the legal purpose. Not only is that, in my opinion, the legal effect of the incorporation, but I think it clear, upon the purview of the Act, that such was the intention of the legislature. We do not find in this Act any power whatever to purchase land; and I take it to be quite clear, that if the corporation had been meant to purchase lands, there would have been power given to them for that purpose. *Mr. Bird* remarked, that there is no clause disabling the society from purchasing land; but negative words are not necessary, it would require an enabling clause to give them the power of purchasing. Again, by the fourth section of the Act of incorporation, the whole power of the society is to be exercised \* by a com- \* 125 mittee; and by the seventh section the committee are empowered to make such regulations as shall not be repugnant to the laws of the country. It is clear, therefore, that the legislature intended to give no power to the committee to make any laws or regulations which should be repugnant to the laws of this kingdom, and therefore to the statute of mortmain.

Various cases have been cited upon this subject. No doubt a bequest for the purpose of building has been held to imply a purchase of land, and therefore such a bequest has been held to be void, according to the provisions of the statute of mortmain. But



the cases go further ; and Mr. Walker urges, that every bequest is void which is such as to induce a purchase of land. That argument admits of a clear answer. If this corporation is not authorized to purchase land, the bequest could not induce them to lay out money in purchasing land. Reference, too, has been made to the 43 Geo. 3, c. 108, giving validity to bequests to the extent of 500*l.* : all that that Act shows, is, that the legislature contemplated that some bequests for building churches might be obnoxious to the statute of mortmain, and it gives validity to them to that extent. It certainly does not show that the legislature contemplated that every bequest for promoting the enlargement, building, and repairing of churches and chapels, would be invalid, or that a bequest to this society for this purpose would be void. Subject, therefore, to what my learned brother may say, who, however, I believe entirely concurs in this view, I am of opinion that the bequest is perfectly valid.

The Lord Justice KNIGHT BRUCE concurred.

1853. March 5 & 9. Before the LORDS JUSTICES.

Where a debtor became bankrupt in England, having real estate in Scotland, *held*, that this state of circumstances gave no jurisdiction to the Court of Chancery to restrain a creditor who had not proved under the bankruptcy from proceeding in an action against the assignees in Scotland, for the purpose of recovering out of the real estate there an amount equal to the dividend which would have been payable upon the debt, and the grounds on which the Court of Chancery restrains creditors from proceeding against an executor after a decree for administration do not exist in such a case.<sup>2</sup>

<sup>1</sup> S. C., 17 Jur. 247.

<sup>2</sup> See *Graham v. Maxwell*, 1 M'N. & G. 71 and cases in note (2); *Dehon v. Foster*, 4 Allen, 550; 1 Dan. Ch. Pr. (4th Am. ed.) 800; 2 *ib.* 1626, 1627, and cases in notes; *Liverpool Marine Credit Co. v. Hunter*, L. R. 4 Eq. 62; S. C., L. R. 3 Ch. Ap. 479. The Supreme Court of Massachusetts has jurisdiction in equity, upon a proper case being made, to enjoin a citizen of Massachusetts from availing himself of an attachment of personal property in another State, in an action against a debtor who is insolvent under the laws of Massachusetts, and

Principles on which a creditor is restrained from proceeding after a decree for administration.<sup>1</sup>

THIS was an appeal from the decision of Vice-Chancellor KINDERSLEY, granting an injunction to restrain the defendant Robert Roy, his mandatories and agents, from prosecuting an action commenced by him in the Court of Session in Scotland against the plaintiffs, as assignees of Mr. Archibald Campbell, a bankrupt.

The bankrupt carried on business in Regent Street as an army agent and banker till 1830, when a commission of bankruptcy was duly issued against him and his partners, under which they were found bankrupts; and debts having been proved to the amount of 80,000*l.* against the joint and of 23,000*l.* against Mr. Campbell's separate estate, dividends amounting to 1*s.* 7½*d.* in the pound had been declared upon the joint estate, and dividends amounting to 5*s.* 6*d.* in the pound had been declared upon Mr. Campbell's separate estate. On the 18th of May, 1846, the succession of the entailed estate of Lochnell opened to the bankrupt, who duly executed a conveyance thereof to the assignees under his bankruptcy. The bankrupt had not obtained his certificate. In November, 1846, the defendant

thus preventing the same from coming to the hands of the assignee; and it is no objection that the action was commenced before the institution of proceedings in insolvency, if this was done with knowledge that such proceedings were about to be instituted, and with a view to obtain a preference. *Dehon v. Foster*, 4 Allen, 545; S. C., 7 Allen, 57.

<sup>1</sup> If there has been a decree for the administration of assets, the Court will restrain a creditor, who is not a party to the suit, from proceeding at law against the testator's or intestate's estate, for his debt. *Thompson v. Brown*, 4 John. Ch. 642; see *Benson v. Leroy*, 4 John. Ch. 651; *Udike v. Doyle*, 7 R. I. 460, 461. This it does, because it considers that the decree which it has made is in the nature of a judgment for all the creditors; and having taken the fund into its own hands, it will administer it equitably, and not permit the executor to be pursued at law. *Martin v. Martin*, 1 Ves. Sen. 211, 214; *Lee v. Park*, 1 Keen, 714, 719; *Macrae v. Smith*, 2 K. & J. 411, 412; *Hazen v. Durling*, 1 Green Ch. 138; *Udike v. Doyle*, 7 R. I. 446, 460, 461. This practice of restraining a creditor, although no injunction has been prayed in terms against him, may be followed, where the creditor is suing in a foreign Court (*Graham v. Maxwell*, 1 M'N. & G. 71; 13 Jur. 217), if he has adopted the proceedings here, or a very strong case can be made out, showing the inexpediency of permitting him to continue the proceedings in the foreign Court. 2 Dan. Ch. Pr. (4th Am. ed.) 1614, 1615; *Carron Company v. Maclaren*, 5 H. L. Cas. 416, reversing S. C. *nom.* *Maclaren v. Stainton*, 16 Beav. 279; *Hope v. Carnegie*, L. R. 1 Ch. Ap. 320; *Baillie v. Baillie*, L. R. 5 Eq. 175.

Robert Roy commenced an action before the Court of Session in Scotland against the bankrupt, concluding that the bankrupt should be ordained to make payment to him of 3800*l.* due upon a

\* 127 \* bill of exchange dated 20th of August, 1828, with interest and costs.

While these proceedings were pending, on the 22d of November, 1848, an order was obtained by Mr. Roy to intimate the dependence of the action to the official assignee, that he might sist himself as a party thereto if so advised. The official assignee having been advised that he ought not to sist himself in and have no concern with the action, declined to do so, and refrained from taking any proceedings therein or appearing thereto.

Afterwards, Robert Roy, and Hugh Ross, writer to the signet, his mandatory, commenced an action before the Court of Session in Scotland against the plaintiffs in equity, by summons dated and signeted on the 1st of December, 1852, concluding that it should be by decree of the Court found and declared, that in the event of Mr. Roy establishing his claim in the action then in dependence at his instance against the bankrupt for payment of the principal sum of 3800*l.* contained in the bill of exchange, Mr. Roy was entitled to receive a dividend or dividends from the bankrupt estate of Archibald Campbell equal to the dividend or dividends drawn, or which might be drawn, by the other creditors of the bankrupt, and that the defenders should be decerned and ordained to make payment to the pursuer of the sum of 3800*l.*, and interest thereon, or of such other sum or sums as should be equal to the amount of dividend or dividends drawn or to be drawn by the other creditors of the bankrupt, on their respective claims against his bankrupt estate, and in the mean while to consign or deposit in bank, or otherwise secure in such manner as the Court of Session should ordain, the sum of 3000*l.*, or such other sum as should be sufficient to meet such dividend or dividends.

\* 128 \* According to the law and practice of Scotland, the pursuer of any action commenced in the Court of Session is entitled, as of course, to attach the real and personal estate of the parties named as defenders to such action at any time after the commencement thereof, and from time to time during its dependence, in security of the claim advanced in the summons by which the action is commenced, and such attachment of the personal estate of the defender is laid on by means of a warrant of

arrestment contained in or annexed to the writ of summons. In conformity with this law and practice the above summons at the instance of Mr. Roy against the plaintiffs contained a warrant to arrest their personal estate; and in pursuance of this warrant, and without any previous notice or intimation to the plaintiffs or their agents in England or Scotland, Mr. Roy used arrestments in the hands of the tenants of the estate of Lochnell.

At the time these arrestments were laid on, there were rents owing from tenants to the plaintiffs, or in the hands of their factors, to the amount of 1300*l.* and upwards. According to the law and practice of Scotland, arrestments used on the dependence of an action continue in force until the action is disposed of by a judgment in favour of the defender thereto; and in case of a judgment therein in favour of the pursuer, such pursuer acquires a title to proceed against the arrestee to recover the moneys arrested.

In consequence of the arrestments, the arrestees refused to pay over to the plaintiffs the moneys owing from them or in their hands, and the plaintiffs were prevented from recovering payment thereof in any court or by any proceedings in Scotland, by reason of the arrestments.

\* On January 14, 1853, the bill was filed in the present \* 129 suit by the assignees, praying no relief except an injunction to restrain Mr. Roy, his mandatories and agents, from prosecuting the action against them, the assignees, in the Court of Session, or against the real estate of Campbell, or the rents thereof; and from continuing or permitting to continue or remain in force the arrestments; and from laying any further or other arrestments upon the rents hereafter to become due from the tenants of the estate of Lochnell, or suing out execution, or any other diligence or process against the real or personal estate of the bankrupt.

Vice-Chancellor KINDERSLEY, on the 16th of February, granted the injunction in the terms of the prayer of the bill. From that order Mr. Roy now appealed.

*Mr. Bacon* and *Mr. Giffard*, in support of the appeal. — There is no equity to support this bill. Suppose the action had been brought in England, what jurisdiction would this Court have had to restrain it?

They referred to *Kennedy v. Earl of Cassillis* (a) and the authorities there collected, and to *Simpson v. Lord Howden*. (b)

*The Solicitor-General, Mr. Anderson, and Mr. Karlake*, for the plaintiffs. — In an anonymous case (c) Lord ELDON says :  
 \* 130 “The bankrupt statutes are framed with a view to \* the authority, with which the Lord Chancellor is intrusted, in the exercise of his ordinary jurisdiction; and when these statutes are silent as to the mode of compelling obedience to the orders, that may be necessary for carrying the provisions of the statutes into effect, it is enforced by the general jurisdiction for the attainment of the objects of the commission.” And in *Ex parte Bradley* (d) he said that it was the intention of the legislature, in giving jurisdiction to the Chancellor in bankruptcy, to give him power to use in bankruptcy the authority used in causes in chancery, where no specific authority was given by the statutes. In *Barker v. Goodair*, (e) Lord ELDON, in granting an injunction to restrain proceedings on a foreign attachment after a commission of bankruptcy, says, “In the case of a judgment by a separate creditor, both the partners being solvent, it has been held, that the creditor may take by execution a moiety of a chattel; though he is only a separate creditor. A great variety of difficulties occur as to that; whether it stands in equity as at law. It is clear a partner holds a chattel with his partner, subject to all the equities that partner has upon it. A question has often occurred, whether a separate creditor, taking a moiety of the chattel in execution, is in the same circumstances; viz., that he may call for a sale of that chattel, and divide the money: or whether this Court would force upon him the whole account of the partnership; permitting him to take only that interest which the partner, his debtor, would have been entitled to, after the account. But we have gone much greater lengths in bankruptcy as to that, and even in the absence of the other partner. In bankruptcy, after one partner had become a bankrupt, I do not recollect that a joint creditor was ever  
 \* 131 permitted to bring \* an action, and by execution fasten upon a moiety of the effects. On the contrary, in the absence of the solvent partner, if, for instance, he was at Lisbon, we say, the

(a) 2 Swanst. 313.

(d) 1 Rose, 204.

(b) 3 M. & C. 103 *et seq.*

(e) 11 Ves. 85.

(c) 14 Ves. 451.

assignees shall take the joint property, and deal with it as the partner himself ought to have dealt with it; paying all the joint creditors equally, as far as the joint property goes; and applying the surplus, if any, under all the equities subsisting between the partners themselves. This is done here every day; though how it originally became law I do not know. We have in some degree pursued it in the administration of assets, though very tenderly." In *Jones v. Geddes* (a) the late Vice-Chancellor of England granted an injunction, at the suit of assignees of a bankrupt, to restrain proceedings in the Court of Session in Scotland, on a bond executed before the bankruptcy, against real estate there. Although Lord LYNDBURST, on appeal, dissolved the injunction, he fully recognized the right of the Court to interpose.

They also referred to *Graham v. Maxwell* (b) and *Maclaren v. Stainton*, (c) and compared the case to one in which a decree has been made for the administration of a testator's assets.

*Mr. Bacon*, in reply.

March 9.

THE LORD JUSTICE KNIGHT BRUCE. — This case, which, if not wholly unimportant, is not of the importance which has been ascribed to it, occupied in discussion the whole time of the Court on Saturday last, but was nevertheless well argued, by which I mean that included in what the Court heard was every observation reasonably possible.

\* The matter arose thus: A frivolous and vexatious suit \* 132 was instituted in Scotland, without, as I believe, the least chance of success. The defenders, instead of meeting it there, instituted here the suit now before us (one as frivolous, I think, though less vexatious), for the purpose of staying the other. They made a motion accordingly before a learned Vice-Chancellor, and obtained the order that they desired, with which one might have supposed their adversary, the defendant here, pursuer in Scotland, likely to be also well content. But no; the attractions of a desperate Scotch law-suit seem more powerful than one would have guessed. A writer to the signet, as he once had been, *agnovit veteris vestigia flammæ*. The Court of Session had only pleasing

(a) 14 Sim. 606; S. C., on appeal, 1 Phil. 724.

(b) 1 M. & G. 71.

(c) 22 Law J., N. S. Ch. 274.

alarms for him. Rejecting the hand offered to extricate him from what he had fallen into, he chose to remain in, and so has brought before us this appeal, which, as I have said, it was our fortune to hear during an entire judicial day, and we are now to dispose of.

Few facts need be mentioned. A Scottish gentleman, resident and carrying on business in England, was duly made a bankrupt in England. Part of his property consisting of a real estate in Scotland, that estate was possessed accordingly by the assignees, who in that right completed and perfected their title to it, according to the forms and regulations prescribed by the law of Scotland. The defendant, Mr. Roy, is, or claims to be, a creditor of the bankrupt, under such circumstances as that, if Mr. Roy's case is true, he was and is entitled to be, upon his application, admitted to prove a large debt under the English bankruptcy, which, however, he has never done, or claimed or attempted to do, to any extent whatever; and he has not, in the Scotch proceedings already mentioned, and to be mentioned again, or otherwise, alleged

\* 133 that he has ever so proved, or claimed, \* or attempted, or that he intends or wishes to do so. He is in truth absolutely a stranger to the bankruptcy. In this state of things Mr. Campbell, the bankrupt, not having obtained his certificate, has since his bankruptcy been sued for the debt in Scotland by Mr. Roy, who has to that proceeding thought fit to sist as parties defendants the assignees under the English bankruptcy, and is pursuing them accordingly in the Court of Session for the purpose of recovering payment from them or the bankrupt's estate of a dividend on the debt alleged, and perhaps truly alleged, to be due to Mr. Roy from the bankrupt, *pari passu* with the creditors who have claimed and been admitted under the bankruptcy. The assignees not having appeared, he has resorted to arrestment, under which the land in Scotland, already adverted to, has been and still is very inconveniently affected. By this experiment—this course, of which I am unable to discover the hopefulness or the propriety—have been occasioned the bill and injunction before us; and the question now is, whether the assignees are entitled to file a bill in the English Court of Chancery to restrain Mr. Roy from these measures?

How the case would have stood if he had proved or claimed, or alleged himself to have proved or claimed, or to intend to prove or claim, under the English bankruptcy, it is unnecessary to say: but as the facts are, I see nothing to support such a bill. If it is

assumed that he ought to succeed in his Scotch proceedings, he ought not to be interfered with here. The contrary assumption, as I conceive, cannot give an equity to the assignees as plaintiffs against him. It is not a duty or function, or within the power of this Court, to restrain men from prosecuting frivolous, litigious, and desperate suits, merely because they are so, — at least unless the experiment shall have been repeated once or twice, which is \* not the case here. A creditor who has not \* 134 proved or claimed, nor seeks to prove or claim under an English bankruptcy, is under no more obligation, nor owes any more duty to the assignees or the other creditors than he would if he were no creditor at all; and consequently, if he enters into a foolish and perverse litigation with the assignees, they must defend themselves as other men do when prosecuted by the owner of an imaginary grievance.

In the present instance Mr. Roy — entitled to no dividend — claims from the assignees a dividend in a manner that would be irrational and absurd, if he were entitled to a dividend; but how does this confer on them any privilege (if a chancery suit be a privilege) beyond others of the Queen's peaceable subjects, tormented by fanatic litigants?

Something was said of circuitry, and Mr. Anderson, I think, referred to the maxim of the civil law, "*Dolo facit qui petit quod redditurus est;*" or, as it has been otherwise given, "*Dolo facit qui petit quod restituere oportet eundem.*" But though I am not aware of any complimentary designation that Mr. Roy's proceedings against the assignees in Scotland can deserve, I am also not aware that there is *dolus*. Were he, through the assignees' default, or (as it seems to me impossible to suppose) upon the merits, to obtain, by means of the Court of Session, payment of his debt or a dividend from the assignees, or out of the Scotch real estate, and the House of Lords should not be appealed to, or should not dissent from the decision, I do not see how there is ever to be restitution.

Another endeavour on Saturday was to establish a proposition laid down at the bar, of a close analogy, if \* not \* 135 identity, between the present demand on the Court and that of an executor or administrator sued by a creditor or an alleged creditor of the deceased, after a decree under which all his creditors may come. If the analogy existed, I do not know that it would



therefore be right for the Court to interfere in a case such as the present; but there is clearly, in my opinion, no such analogy. The duties of an executor or administrator, the manner in which he represents the deceased, the extent to which and the mode in which he is by law liable to be sued by a creditor of the deceased, the different defences and judgments possible in an action against the executor or administrator, the right which he has to deliver himself from a suit against him, if he cannot do so otherwise, by applying assets for the purpose, and the title which the creditors generally acquire, by a decree, to those assets are alone and obviously sufficient to destroy all ground of comparison between the cases. If Mr. Roy, instead of proceeding in Scotland, had been advised or permitted to commence a suit in Ireland, or in the Court of Queen's Bench here, or in the County Palatine of Lancaster, for the strange purpose for which he has *sisted* the assignees, and under the same circumstances, could a bill have been filed by them here to stay it? I apprehend certainly not, in the absence at least of a vexatious repetition of unsuccessful litigation. The same rule must apply to Scotland, the Courts of which are bound to notice, and do not refuse or hesitate to notice, the English bankrupt law.

I differ, nor need I say I most respectfully differ, from the able and excellent Judge before whom this case has been: and I think that as, according to another maxim of the civil law which we adopt, *invito beneficium non datur*, we are justified in visiting the appellant with success in his appeal.

\* 186     \*THE LORD JUSTICE TURNER. — I am also of opinion that this injunction cannot be maintained. The plaintiffs are the assignees of Campbell, an uncertificated bankrupt, and the case they state by the bill is shortly this: that the defendant, who is resident in this part of the kingdom, alleging himself to be a creditor of the bankrupt, but not having proved his debt under the commission, has brought an action in the Courts of Scotland against the plaintiffs, the assignees, for the recovery of dividends equal to the dividends paid and to be paid to the creditors under the commission, and has in that action arrested the rents of some real estates in Scotland, to which the assignees are entitled under the bankruptcy.

The equity on which the bill rests is, that the Court of Bankruptcy in England is the proper Court for proving debts or alleged

debts against the estate of the bankrupt, and that the bankruptcy being in England, the administration of the estate will be embarrassed if the documents relating to the transactions connected with the alleged debt be removed to Scotland. The novelty of the equity thus set up, and the great respect which I feel for the decision of the Vice-Chancellor, induced me to hesitate before pronouncing any opinion upon the question before us; but the further consideration which I have given to the case has confirmed the impression which I felt during the argument, that this equity cannot be maintained. The case was admitted by the learned Judge in the Court below, and has been admitted in the argument at the bar of this Court, to be new in its circumstances; but both in the Court below and in the Court it was said to fall within the principle of other decided cases.

The cases first relied on in the argument were the \* *Anon. (a)* and *Bradley's Case, (b)* from which it was \* 187 attempted to be deduced that a Court of Equity would exercise its jurisdiction in aid of the Court of Bankruptcy. But those cases go no further than this: that the fact of the bankruptcy jurisdiction having been intrusted to the Lord Chancellor justified the conclusion that where the bankrupt statutes were silent, he could exercise in bankruptcy the jurisdiction which he had as Chancellor. They do not at all show that in the absence of equitable circumstances to found its jurisdiction, a Court of Equity, as distinguished from the Chancellor sitting in bankruptcy, would interfere in aid of the bankruptcy jurisdiction. The other cases mainly relied on, upon the part of the respondent, were *Barker v. Goodair, (c)* and *Jones v. Geddes; (d)* but in each of those cases there were circumstances amply sufficient to call forth the jurisdiction of a Court of Equity without reference to its being invoked in aid of the bankruptcy jurisdiction. In the former case there was the question whether the attaching creditors were, as against the assignees of the bankrupt partner, to be confined to his interest in the surplus of the joint estate involving the accounts of the partnership, and there was besides a necessity for the interference of a Court of Equity for the purpose of realizing the goods which had been attached. In the latter case there was fraud distinctly alleged. The cases, in which this Court interferes to restrain creditors from

(a) 14 Ves. 451.

(b) 1 Rose, 204.

(c) 11 Ves. 78.

(d) 14 Sim. 606; 1 Phil. 724.

proceeding either in the Courts of this country or in foreign Courts for the recovery of their debts, were also referred to on the part of the respondents ; but those cases do not seem to me to aid their case. This Court does not in such cases interfere, as it is called upon to do in the present case, before decree, and its interference after decree is, as I apprehend, \* founded on this, that the decree is a judgment for all the creditors. Besides, this Court has by the decree the complete control of the estate, and it would not permit its jurisdiction to be interfered with.<sup>1</sup>

None of the cited cases, therefore, by any means support the general position for which the respondent contended. We must look back then to the root of the jurisdiction, for the purpose of seeing whether that position can be maintained, and upon examining it, I am satisfied that it cannot. Lord REDESDALE, in his admirable Treatise on Pleading, has traced and classed the jurisdiction of Courts of Equity, and he has divided it into two classes : one, where the Court is called upon to decide on the right to property ; the other, where it is called upon to interfere without deciding upon any such right. With reference to the first class, he says that the jurisdiction exists where the law gives a right, but does not afford a sufficient remedy, or where the powers of the law are abused, or where the law gives no right, but the principles of universal justice require the interference of judicial power ; and with reference to the second class he thus describes it : “ The Courts of Equity also administered to the ends of justice by removing impediments to the fair decision of a question in other Courts, by providing for the safety of property in dispute pending a litigation ; by preserving property in danger of being dissipated or destroyed by those to whose care it is by law intrusted, or by persons having immediate but partial interests ; by restraining the assertion of doubtful rights in a manner productive of irreparable damage ; by preventing injury to a third person from the doubtful title of others ; and by putting a bound to vexatious and oppressive litigation ; and preventing unnecessary multiplicity of suits ; and without pronouncing any judgment on the subject, by \* 139 compelling \* discovery or procuring evidence which may enable other Courts to give their judgment, and by preserv-

<sup>1</sup> See *ante*, 126 note (3) ; *Graham v. Maxwell*, 1 M'N. & G. 71, and cases in note (2).

ing testimony when in danger of being lost before the matter to which it relates can be made the subject of judicial investigation."

These are, as I apprehend, the true principles by which the jurisdiction of this Court is bounded, and I find nothing in them at all resembling the case put forward by this bill. This is not a case in which the Court is called upon to decide any right of property, and the bill does not, in my opinion, bring the case within any of the cases put by Lord REDESDALE as furnishing grounds for the interference of the Court where no right of property is to be decided. The case presented by the bill is, I think, simply one of interference by a stranger with the property of another, in a mode which is warranted by the law of a foreign country, upon an assumption of right. There may or may not be a foundation for that right; so far as I can see there is none; but whether there is or is not a foundation for the right, I think there is no foundation for the interference of this Court. If we were to maintain this injunction, we should, I think, be greatly extending the jurisdiction of this Court, under the colour of carrying out its principles. If we were to maintain this injunction, we should, as it seems to me, be assuming a jurisdiction in this Court to prescribe the Courts in which parties should bring their suits, without there being any thing to affect the consciences of the parties, upon the simple ground that the suits were such as, in the opinion of this Court, ought not to be maintained; and thus we should be bringing under the decision of this Court the question whether suits in other Courts could be maintained,—a question which it is for those Courts, and not for this Court, to decide. To assume such a jurisdiction would, I think, be to exercise a legislative, \* and not merely a judicial power. Some attempt \* 140 was made to maintain the injunction upon the ground of circuitry of action, but I do not think that ground can be made available in such a case as the present. The ground of inconvenience was also urged in support of the injunction; but I think the question of convenience applies only where there are two Courts having jurisdiction, and does not, therefore, reach the present case. I have less hesitation in discharging this order, because, in my opinion, it is, as was expressed by Lord ELDON in *Wright v. Simpson*, (a) the duty of this Court to give credit to

(a) 6 Ves. 730.

foreign Courts for doing justice in their own jurisdiction;<sup>1</sup> and I feel no doubt that if the claim of the defendant against the assignees be as unfounded as it appears to me to be, the Courts in Scotland have full power to discharge, and will at once discharge the arrestment.

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### MOSTYN v. MOSTYN.<sup>2</sup>

1853. March 16. Before the LORDS JUSTICES.

A testatrix, after appointing her nephew, Robert M., her executor, bequeathed life annuities, and directed "the above bequests to fall into the hands of" her nephew, John Henry M., late of C. Hall; but if he should not marry, to be divided equally between Samuel M., John M., and Mary D., all of them late of C. Hall. The testatrix had a brother living at C. Hall, who had five children born in the following order: Robert John M., John Henry M., Samuel Johnson M., Thomas M., and Mary M., but no nephew named John M. Held, affirming decree of the Master of the Rolls (*dissentiente* L. J. KNIGHT BRUCE), that John H. M., and not Thomas M., was the person meant by "John M."<sup>3</sup>

THIS was an appeal from the decision of the Master of the Rolls upon a claim, and the only question in dispute was, who was the person designated as John Mostyn in the following will of Barbara Sheldon, widow, dated the 24th of November, 1824, and executed on or about the 2d of December following in that year.

\* 141 \* "I direct all my just debts, being made as moderate as possible by my nephew Robert Mostyn, of Callcott Hall, North Wales, Flintshire, who I here nominate my executor, who will of course be liable to the following bequests. I leave to my cousin

<sup>1</sup> As to the grounds upon which Courts of Equity undertake to restrain parties from carrying on proceedings in foreign Courts, see 2 Dan. Ch. Pr. (4th Am. ed.) 1627, 1628; *Dehon v. Foster*, 4 Allen, 550; *Marco v. Low*, 55 Maine, 549; *Baillie v. Baillie*, L. R. 5 Eq. 175.

<sup>2</sup> S. C., affirmed 5 H. L. Cas. 155; 23 L. J. Ch. 925; 17 Beav. 823.

<sup>3</sup> See 1 Jarman Wills (3d Eng. ed.), 353, 354; (4th Am. ed.), 380, 381, and cases in notes; *Stringer v. Gardiner*, 27 Beav. 35; 4 De G. & J. 468; *Green v. Dunn*, 20 Beav. 6; *Thomas v. Stevens*, 4 John. Ch. 607; *Grant v. Grant*, L. R., 5 C. P. 380; S. C., 5 C. P. Ex. Ch. 727; *Gillett v. Gane*, L. R. 10 Eq. 29.

Mr. Thomas Lemon the sum of 50*l.* a year for his life, and also the same sum of 50*l.* a year to his sister Mary Lemon for her life. I also bequeath to my dear, long-*tried* friend Margaret English, when I look back and recollect the number of years that she has expended more than that sum of 50*l.* upon me, her unworthy friend, I feel ashamed in now, yes, in now, writing so shabby a sum; the above Margaret English resides at Saint John's Green, Colchester, Essex. My property in this house to be taken as marked out. My dear nephew John Henry Mostyn of Holywell, surgeon, but late of Callcott Hall, Flintshire, North Wales, the above bequests to fall into his hands, and should he not marry, to be divided equally between Samuel Mostyn, John Mostyn, and Mary Davis, all of them late of Callcott Hall, must receive each 50*l.*, the residue to fall into my above-named executors' hands."

The testatrix died in 1825.

Upon the evidence it appeared that the testatrix had a brother named Samuel Mostyn, who resided at Callcott Hall, and that this brother had only five children, namely, Robert John Mostyn, one of the defendants, John Henry Mostyn, since deceased, Samuel Johnson Mostyn, another defendant, Thomas Mostyn, who was the plaintiff, and Mary Margaret Davies, who with her husband were defendants. These children were born in the above order, and had, until shortly before the date of the will, all been living with their father at Callcott Hall.

There was no one named John Mostyn then or at any \*time during the life of the testatrix, living at Callcott \* 142 Hall.

John Henry Mostyn died in or about the year 1835, without having been married.

The defendant Robert John Mostyn deposed, that the testatrix was in the habit of frequently residing with the deponent's late grandfather, John Ellis Mostyn, of Callcott Hall, prior and up to the year 1802, about which period his grandfather died; but that, to the best of his belief, she was never afterwards in the county of Flint. That the testatrix was personally acquainted with the deponent's brothers John Henry Mostyn, Samuel Johnson Mostyn, and his sister Mary Margaret Davies in the claim mentioned, as well as with himself, having seen them on the occasion of a visit to his grandfather, but that she was not so acquainted with

the plaintiff, whom she had never seen, owing to his not having been born until the year 1806, which was subsequently to the last visit of the testatrix to his late grandfather. He further deposed, that, at the time of the decease of the testatrix, the plaintiff was of the age of eighteen years or thereabouts, and from various conversations which he had at different times with the testatrix, and from remarks then made by her, he was enabled to state, and accordingly deposed, that the testatrix well knew the Christian name of the plaintiff to be "Thomas," and he believed that if she had intended to benefit him, she would have named him in her will; but the deponent believed that, from never having seen the plaintiff, the testatrix took no interest in him, and that, by the bequest to "John Mostyn," contained in her will, she intended to benefit him (the deponent Robert John Mostyn), or his late brother John Henry Mostyn, who was a favourite of hers,  
 \* 143 and frequently visited \* her, and was in conversation called by the name of "John."

The Master of the Rolls dismissed the claim, and the plaintiff now appealed.

*Mr. R. Palmer* and *Mr. Boyle* supported the appeal.

*Mr. Shapter* was for the respondent.

The following cases were referred to in the arguments below, and on the appeal: *Dent v. Pepys*, (a) *Blundell v. Gladstone*, (b) *Beaumont v. Fell*, (c) *Ryall v. Hannam*, (d) *Newbolt v. Pryce*, (e) *Adams v. Jones*, (g) *Doe v. Huthwaite*, (h) *Doe v. Needs*, (i) *Butler v. Bushnell*, (k) *Delmare v. Rebello*. (l)

THE LORD JUSTICE TURNER. — I confess it appears to me that there is not sufficient in this will to entitle the plaintiff to succeed, although I feel considerable difficulty upon the subject. I take the rule of law to be, that if there be a person whose name

(a) 6 Madd. 350.

(b) 11 Sim. 487; 1 Phil. 279; 1 H. L. Cas. 778 (*nom. Camoys v. Blundell*).

(c) 2 P. W. 141.

(h) 3 B. & A. 632.

(d) 10 Beav. 536.

(i) 2 M. & W. 129.

(e) 14 Sim. 354.

(k) 3 M. & K. 232.

(g) 9 Hare, 485.

(l) 3 Bro. C. C. 446.

answers the description of a legatee which is contained in the will, powerful reasons must be found to take away from that person the benefit given by the will, and to give it to another, whose name does not answer the description. The present case seems to me to be one in which, if we hold the gift to John to mean a gift to \*Thomas, we shall be departing from this \*144 rule of construction, and going into a field of conjecture. It is not at all impossible that the testatrix intended that the benefit of the funds, the income of which she had given for the lives of her legatees, should on their death go to John Henry Mostyn, and that if he married, he should keep them all, but that if he did not, he should have one-third. It is true that she has in one place described him by the title of John Henry. Still her intention might have been to refer to the same person whom she used simply to name John. I confess, therefore, that I do not think there is sufficient in the circumstances of this case (there being a person thus answering the description) to show that Thomas was meant by the testatrix. My opinion is, that the judgment of the Master of the Rolls must be confirmed.

THE LORD JUSTICE KNIGHT BRUCE.—The will, with the assistance of the extrinsic evidence legally admissible in aid of its construction, appears to me to show plainly enough that by "John Mostyn" mentioned in it, was intended either John Henry Mostyn, or Thomas Mostyn the plaintiff; the only question being which of these two persons was meant.

The point is not free from difficulty. But my opinion is in favour of the plaintiff, for these reasons. 1st. The will in a previous part of it, where John Henry Mostyn is clearly intended, mentions him by his full and correct name and description. 2d. Though each of the niece and nephews (except Thomas) had two Christian names, yet in no instance has the testatrix mentioned both Christian names, except in the only or the first instance of naming John Henry Mostyn. 3d. Though the testatrix had heard the Christian name of her brother's \*youngest \*145 son, she was not personally acquainted with the plaintiff, and he was under twenty years of age when she died. 4th. Robert John, the nephew first mentioned in the will, was the eldest of the testatrix's four nephews; John Henry, the nephew secondly mentioned in the will, was the next eldest of her nephews; Samuel,



the nephew thirdly mentioned in the will, was also her third nephew in point of age; and the plaintiff was her youngest nephew. 5th. The testatrix, in mentioning "Samuel Mostyn, John Mostyn, and Mary Davis," together, seems to mention them rather as persons of whom no one, than of persons of whom one, had been mentioned by her before, and adds "all of them late of Calcott Hall." 6th. To ascribe to her the intention of giving John Henry Mostyn a share of a gift, so made as to take effect not until his death, and then only if he should die a bachelor, is to ascribe to her, I do not say an impossible, but an unlikely intention. 7th. The added words, "must receive each fifty pounds," seem to me particularly favourable to the plaintiff's construction. Upon the whole, I repeat that I think him right. My learned brother being, however, of the same opinion as the Master of the Rolls, his Honor's order will stand affirmed.

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\* 146 \* THE OFFICIAL MANAGER OF THE GRAND TRUNK OR STAFFORD AND PETERBOROUGH UNION RAILWAY COMPANY *v.* BRODIE.<sup>1</sup>

1853. March 19, 21. Before the LORDS JUSTICES.

The Court has jurisdiction to direct an official manager of a joint-stock company appointed under the winding-up Acts who, in that character, has unsuccessfully instituted a suit, to pay the costs of it personally.<sup>2</sup>

An order that "W. T., official manager of the said company," do pay costs is an order rendering him personally liable to make the payment.

*Seem*, that the 53d section of the Winding-up Act of 1848, authorizing the prosecution of suits by the official manager, does not extend to a suit commenced by one shareholder on behalf of himself and the others, except such as are defendants.

THESE were two motions to the same effect, made on behalf of different defendants, by way of appeal from an order of Vice-Chancellor Wood, made on the 4th of March, 1853, setting aside a subpœna for payment of costs by the plaintiff personally, and staying all proceedings thereupon.

<sup>1</sup> S. C., 9 Hare, 823.

<sup>2</sup> See 2 Lindley Partn. (Eng. ed. 1860) 1146; *Caldwell v. Ernest*, 27 Beav. 39.

The case is reported upon the original hearing in the ninth volume of Mr. Hare's Reports, page 823. By the order then made, the Court dismissed the bill with costs with the following direction: "And it is ordered that such costs when taxed be paid by William Turquand, the official manager of the said company, unto," &c.

Each of the present motions was, that the order made in these causes by Vice-Chancellor Wood, on the 4th of March, might be discharged, or that, if necessary, the decree made on the hearing of these causes, and bearing date the 26th of June, 1852, might be rectified by striking out after the words "William Turquand," the words "the official manager of the said company," or might be otherwise varied in such manner that process might be executed against the said William Turquand personally, and that so much of the said order of the 4th of March, \* instant, might \* 147 be discharged as directed, that all further proceedings against the said plaintiff personally for non-payment of the costs under the said decree might be stayed.

*Mr. Baily* and *Mr. Kenyon*, in support of one of the motions, and

*Mr. Selwyn*, in support of the other, were stopped by the Court, who desired first to hear the counsel for the plaintiff.

*Mr. Daniel* and *Mr. Little*, for the plaintiff, relied upon the 53d, 56th, and 59th sections of the Winding-up Act of 1848. (a)

(a) Sect. 53. "Where any action, suit, or other proceeding shall have been brought or instituted, and shall be pending by or on behalf of the company in respect of which such official manager shall have been appointed, or by any person duly authorized to sue as the nominal plaintiff on behalf of such company, or by any one or more of the members or contributories of such company acting or suing in the name or on the behalf of himself and the other members or contributories thereof as the plaintiff or plaintiffs against any person, it shall be lawful for such plaintiffs to substitute the official manager of the company, by such style or designation as hereinbefore mentioned, as the plaintiff in such action, suit, or other proceeding, by entering a suggestion on the roll to that effect, in such action, and by obtaining an order to that effect in such suit, such order to be obtained on motion or petition without notice; and it shall be lawful for the official manager thenceforward to prosecute such action, suit, or other

\* 148 \* The Lord Justice KNIGHT BRUCE. — The original bill in this cause was filed before the passing of an Act of Parliament, which we are authorized to call “The Joint-stock Companies’ Winding-up Act, 1848,” an enactment that has, I believe, done good in some few instances, but has done the reverse in so many more, and so extensively, that it seems to be one of those curative measures not by any means confined to a single branch of science, where the remedy is worse than the disease.

\* 149 \* After the change thus made in the law, the company, or association, or partnership on whose behalf the suit is alleged to have been instituted, became subjected to the provisions of the statute, that is, its affairs were ordered to be wound up. An official manager was accordingly to be appointed as the Act

proceeding in the same manner and with the same effect to all intents and purposes as if such action, suit, or proceeding had been commenced by the official manager as plaintiff under the provisions of this Act.”

Sect. 56. “All orders and decrees made or pronounced in any suit or proceeding in any Court of Equity against the official manager of any company shall have the like effect and operation upon and against the property of such company and upon and against the persons and property of every contributory thereof, as if the same had been made and pronounced against the company, or any person duly authorized to be sued as the nominal defendant on behalf of the same, or (as the case may be), as if every contributory of such company were actually before the Court as a party to such suit or proceeding; and it shall be lawful for the Court by which any such decree or order shall have been made or pronounced to direct, by the same or any subsequent order, subject, nevertheless, to such terms, if any, as the Court shall think fit to impose, that any such decree or order made or pronounced against any such official manager as aforesaid be enforced against every contributory of such company, or against any particular class or classes of contributories, to the extent of their legal or equitable liabilities; and thereupon and upon an order for that purpose, to be obtained upon motion to be made *ex parte*, but in open court, such decree or order shall, after seven days’ notice to the particular person or persons sought to be charged, be enforced and executed accordingly.”

Sect. 59. “That no judgment, decree, or order to be obtained or entered up against the official manager of any company as representing the same shall affect or be executed against the person or property of the party who may for the time being be such official manager otherwise than as a contributory, and that every official manager shall always be fully reimbursed and indemnified out of the assets of the company or out of the credits thereof, and, if necessary, by calls to be made on the contributories for all losses, costs, charges, damages, and expenses, without deduction, save and except such, if any, losses, costs, charges, damages, and expenses as shall have been unduly or improperly sustained or incurred by any such official manager.”

directs; and Mr. Turquand, who became that official manager, was afterwards, perhaps duly, perhaps unduly, but was, in fact, made plaintiff in the original bill, instead of the original plaintiff, and subsequently filed an additional bill in the same suit, which, thus comprising two bills, was prosecuted by Mr. Turquand to a hearing, when they were dismissed, with costs. And the question before us is, whether Mr. Turquand is personally liable to these costs, — a question to which, if the answer is to depend on the language of the decree or order of dismissal, that answer must, I think, be unfavourable to him. For the tenor of the decree or order appears to me conformable to the known intention of the learned Judge who pronounced it; that is to say, in my judgment it makes, or purports to make, Mr. Turquand personally responsible for the payment, and liable to an attachment for non-payment of them. Certainly, in that part of the decree or order, he is described, not by his name only, but also by his designation of official manager. But this circumstance seems to me immaterial. Then arises, however, the controversy whether the learned Judge had jurisdiction or lawful power so to direct, — a controversy, perhaps, not with strict propriety belonging to these motions. I assume, however, in Mr. Turquand's favour that it does so. He says that those portions of the Act which lie between the 49th and 61st sections exempt him personally; and there is, I agree, enough in them to raise an argument, the statute not being one of those, so very rare in modern times, which are free from obscurity upon points of importance.

\* He relies mainly on the 53d, 56th, and 59th sections. \*150 I doubt, however, very much whether the 53d extends to a case of the present description, in which one shareholder of an inchoate and imperfectly formed company was, on behalf of himself and the other shareholders not defendants to his bill, suing some of the shareholders in equity. But the 56th section, I think, does not, even if we could possibly suppose a state of circumstances in which the 56th section could be applied, where the official manager is originally, or becomes by substitution, the plaintiff. The 57th section relates only to actions, and it seems to me that the prior, or disabling or prohibitory portion, of the 59th cannot reasonably be held applicable to a case coming neither within the 56th nor within the 57th. I think that, unless, perhaps, in the latter part of the 59th, namely, in that portion of it which provides for the

reimbursement and indemnity of the official manager, the 59th does not touch the present suit.

I differ, therefore, though with respect the most unfeigned, from the able Judge before whom this matter has last been, and should, had I been sitting for him, have refused the application of Mr. Turquand (upon whom personally there is possibly or probably no ground for imputation of any kind), with costs. It is competent to him to ask of the Master a direction for his reimbursement and indemnity, and perhaps the Master may comply with the request, which I have not intended by what I have been saying to prejudge or affect; a remark that I may also make as to the right, if any, of the defendants before the Court, to apply to the Master for his interposition or aid as to the costs in dispute, a point that seems in every respect immaterial here, Mr. Turquand's solvency being unquestioned. Nor can any thing that has fallen from  
 \* 151 me apply to a case where an official \* manager is in that character a defendant. Before parting with this matter I will only add that the proviso at the end of the 60th section (a) seems to me almost, if not altogether, to render necessary the conclusion at which I have arrived, though I have laid no stress upon it.

THE LORD JUSTICE TURNER. — Before giving my opinion upon the question in dispute, I desire to repeat, that upon Mr. Turquand's conduct I never intended to cast any imputation whatsoever. That the suit was improperly instituted I entertain no doubt; that it has been improperly prosecuted since Mr. Turquand was made plaintiff in it I have also no doubt. But I do not impute to Mr. Turquand personally the mode in which these proceedings have been conducted.

As to the questions in dispute, they are two: first, whether the Court has jurisdiction to make an order in such a case as this, directing the costs to be paid by the official manager personally; and, secondly, whether it is the fair import of the order as it stands, that the costs shall be so paid.

(a) After enacting that no action, suit, or other proceeding shall be instituted, brought, or proceeded with by the official manager but with the leave of the Master, the section concludes thus: "Provided always, that the want of such leave as aforesaid shall not be set up as, or in any wise constitute, a defence to any such action, suit, or other proceeding."

Now, as to the first question, I take it to be clear that the Court must have jurisdiction over the proceedings before it to enable it to make the order, unless there are negative words in the Act excluding such jurisdiction. \* I have looked carefully \* 152 through the Act, including those sections to which our attention has been particularly called, and I have reconsidered my former decision; and I must say that I entertain no doubt whatever that in this Act there are not to be found any words excluding the power of the Court to visit the official manager with the payment of costs personally, if the Court thinks that there is a proper case for so doing.

The remaining question is, whether the decree has been properly drawn up, so as to visit the official manager personally with payment of these costs. I think it is, for this reason: where a party to a proceeding is by name ordered to do any act, it becomes his duty personally to do that act. Now Mr. Turquand is here ordered to pay costs by his name, described, it is true, as official manager. On this ground, and on those which have been already stated by my learned brother, I think that this order directs payment by Mr. Turquand personally. I will just put one case by way of illustration. Suppose a bill to be filed by an executor against a debtor to the estate, and to be dismissed with costs. Would it make any difference if the costs were directed to be paid by A. B., "executor of C. D."? A. B. may be entitled to reimburse himself out of the testator's estate; and I repeat that it was not my intention to prejudice the question as to the propriety of the plaintiff here being reimbursed out of the assets of the company. But that in either case the costs are payable by the party personally in the first instance I have no doubt whatever.

\* 158      \* In the Matter of The TRUSTEE ACT, 1850,

AND

In the Matter of SARAH ROLLE'S CHARITY.

*Ex parte* SIR ISAAC LYON GOLDSMID, and Others.

1858. March 21. Before the LORDS JUSTICES.

A petition for the appointment of new trustees of a charity should be entitled, In the Matter of the 52 Geo. 3, c. 101, as well as, In the Matter of the Trustee Act, 1850, and the Attorney-General's *fiat* should be obtained before the petition is disposed of.

THIS was a petition for the appointment of new trustees of a charity, which their Lordships heard for Vice-Chancellor KINDERSLEY.

The charity was constituted by a deed dated the 22d of June, 1786, whereby Sarah Rolle released unto William Thomas, Richard Serle, and Richard Mallett, and to their heirs a messuage or tenement at East Tytherley, and also an annuity or fee farm or other rent of 32*l.* 18*s.* 6½*d.*, issuing out of, and payable out of or for, the manors of Moundsmore and Stubbing, in trust\* after her decease to pay and apply the rents, issues, and profits of all and singular the premises to John Rolle and his heirs and assigns, lords of the manor for the time being of East Tytherley aforesaid, to Edward Jones and his successors, rectors for the time being of the parish of Mottisfont; William Kingsman and his successors, rectors for the time being of the parish of West Tytherley; Thomas Munday and his successors, curates for the time being of the parish of East Tytherley; and to William Thomas, Richard Serle, and Thomas Puckeridge and their heirs, who should be named, deemed, and called trustees and overseers of the charity thereby constituted to be by them applied after the decease of Sarah Rolle to the charitable uses, intents, and purposes

\* 154      thereinafter \* mentioned, being trusts for the education and maintenance of four poor boys and six poor girls. The deed declared that the lord or lords of the manor of East Tytherley for the time being, the rector of Mottisfont for the time being, the rector of West Tytherley for the time being, and the curate of East Tytherley for the time being, should be standing trustees or

overseers of the charity, but that if William Thomas, Richard Seale, or Thomas Puckeridge, or either of them, should die, the surviving trustees or overseers should choose from time to time others to supply their places within twelve months after his or their decease.

The petitioners were the lord of the manor, the rectors, and the curate, above designated, the only existing trustees of the charity. The petition prayed that three other persons might be appointed to be trustees thereof conjointly with them. It was entitled, In the Matter of the Trustee Act, 1850, and of the Charity.

*Mr. Fooks* supported the petition.

*Mr. Wickens*, for the Attorney-General, consented to the prayer, but submitted whether the petition should not be entitled in the Matter of Sir Samuel Romilly's Act, and whether the *fiat* of the Attorney-General should not have been obtained. He referred to a recent unreported case before the Master of the Rolls, where the petition had been ordered to stand over for the *fiat* of the Attorney-General; and submitted that the practice was a salutary one, as it prevented the appointment of trustees of charities from being made behind the backs of the persons interested in them.

*Mr. Fooks* contended that in all cases when this had been required, something more than the appointment of \* new \* 155 trustees was sought. He referred to *Re Nightingale's Charity*. (a)

Their Lordships held that the petition ought to be entitled as suggested, and that the *fiat* of the Attorney-General must be obtained.

(a) 3 Hare, 336.

[ 121 ]



*Ex parte* ALBERT BALL, THOMAS ECKERSLEY, and ROBERT HURST.

In the Matter of WILLIAM BYROM, HENRY TAYLOR, and THOMAS BYROM, Bankrupts.

1853. January 26 and February 14. Before the LORDS JUSTICES.

Coal proprietors employed colliers, to whom the work was let off at so much per score baskets, and each collier had a drawer attached to him, whom he brought when he was himself hired. The colliers were not hired unless the manager approved the drawers, or unless, in case of disapproval, the colliers took drawers provided for them by the manager. The colliers paid the drawers out of their earnings according to an agreement between them (in which the coal proprietors took no part), and discharged the drawers as they thought fit, without interference on the part of the proprietors, except that the latter might discharge the collier if he unjustly discharged the drawer, and that both collier and drawer might be discharged for transgressing the rules of the mine. Upon the proprietors becoming bankrupt, and the colliers' wages being in arrear, held that the drawers were not servants of the coal proprietors so as to be entitled to payment in full of half a year's wages.

THIS was an appeal from a decision of Mr. Commissioner SKIRROW. The bankrupts were coal proprietors, and the question was, whether the appellants, who were "drawers" employed in the mines, were labourers or workmen "of the bankrupts," within the meaning of the 169th section of the Bankrupt Law Consolidation Act, 1849, providing "That when any bankrupt, at the filing of the petition of the adjudication, shall be indebted to any labourer or workman of such bankrupt in respect of the wages or labour of such labourer or workman, it shall be lawful for the Court, on proof thereof, to order so much as shall be due, not exceeding 40s., to be paid to such labourer or workman out of the estate of such bankrupt."

\* 156 \* There was no conflict of evidence as to the nature of the engagement of the drawers, as to which an affidavit of the underground manager of the colliery was read, to the following effect: "All the men and lads working under ground were under my control; the men so employed are colliers and drawers; the amount paid for work done is paid to the colliers, and they pay to the drawers as they agree among themselves. I consider that both colliers and drawers are my servants. I can discharge either

colliers or drawers when I think they behave improperly. I tell the colliers and the drawers what work they are to do. I sometimes hire drawers myself; I keep them at labourer's work until I know of a collier who wants one to do the drawing. When I hire a collier, he usually has a drawer: when I hire a collier, I always ask him who is his drawer. The work where colliers and drawers are employed together in all cases is paid for according to the amount actually done by both of them: the whole wages are paid to the collier; the drawer divides with him as they have agreed. In all other respects except this division of payment, the collier and the drawer are the same to me; I treat them all alike as my servants, and they all behave to me as my servants. It would make no difference in this respect if, instead of paying the collier the whole sum earned, a part were paid to the collier and a part to the drawer; it makes no difference to the master how the division is made, they are all his servants. I never interfere between the collier and drawer as to the wages. When a collier has not a drawer, I sometimes find him a lad who has worked as a labourer for me; for, the moment a drawer goes to the colliery, I have nothing to do with paying his wages. A collier could discharge his drawer, but if I thought he was discharging him without just cause, I would not allow him to do so; if he persisted, I should discharge the collier himself. Sometimes I have \* ordered a drawer to leave his collier, and mend a road, but \* 157 I have paid the collier for the drawer's time. When a collier comes, and has not a drawer, sometimes I have refused to employ him, and sometimes I have engaged him, and sent a drawer to him, and left them to make their own arrangement. There are printed rules posted about the collieries, to regulate the mode in which the work, the using of lamps, and other matters are to be done, and all persons are to observe them; if a drawer broke these rules, I should consider I had power to discharge him."

*Mr. Rogers* supported the appeal.

*Mr. J. V. Prior*, on behalf of the assignees, opposed it.

THE LORD JUSTICE KNIGHT BRUCE. — It has been difficult to avoid in this case feeling a wish to decide it in the petitioners' favour, if possible. But I have not been able to convince myself

that the learned commissioner's conclusion is erroneous,—to persuade myself, namely, that there were contracts between the owners or lessees of the colliery and the drawers, such as to bring the latter, upon the bankruptcy of the former, within the meaning of the section of the Bankrupt Law Consolidation Act, on which the petition proceeds. The weighty opinion of Sir John Patteson, whom we have consulted on the question, as a legal question, is, that they were not. My learned brother too thinks with the commissioner as to the law and equity of the case, so that his decision would stand affirmed, even were I dissentient from it, which, I repeat, that (though entertaining some degree of doubt) I am not.

THE LORD JUSTICE TURNER.—This was a question of \* 158 proof against the estate of the \* bankrupts. The bankrupts were coal proprietors, and for some time previous to and at the time of their bankruptcy were working a coal mine called the Stangeways Hall Colliery. For this purpose they employed a number of colliers, to whom the work was let off at so much per score baskets; and it appears that each collier had a drawer attached to him. The wages of the drawers were in arrear at the time of the bankruptcy, and they tendered proofs before the commissioner for these arrears. The commissioner rejected the proofs, and the case now comes before us on appeal from his decision. We are of opinion that the decision of the commissioner was correct, and that the appeal must be dismissed. The question, as we think, depends wholly upon whether the bankrupts were indebted to the drawers, and we are of opinion that they were not. It appears, by the evidence before the commissioner (which is the only evidence before us), that when the colliers were hired they brought their drawers with them, and that the colliers were not hired, unless the bankrupts' manager approved the drawers, or unless, in case of disapproval, the colliers took drawers provided for them by the manager; that, whether the drawers were brought by the colliers or provided by the manager, they were paid by the colliers out of their earnings: and that they were so paid according to such agreements as they might have made with the colliers, neither the bankrupts nor their manager taking any part whatever with reference to such agreements; that if the manager at any time withdrew the drawers from the service of the colliers, he paid the colliers for the drawers' time; that the

colliers had full power to discharge the drawers ; and that neither the bankrupts nor their manager interfered with this power, further than that if the colliers discharged their drawers unjustly, the colliers would themselves be discharged ; and that the drawers as well as the colliers were liable \* to be discharged \* 159 by the manager for transgressing the rules of the mine.

Under these circumstances we are satisfied that no action at law could have been maintained by the drawers against the bankrupts, and that the bankrupts were not legally indebted to the drawers.

It was urged, however, that the drawers had an equity to be paid out of the wages earned by the colliers ; but, assuming this to be the case, we do not think that it could better the position of the drawers. It could entitle them only to stop the moneys belonging to the colliers in the hands of the bankrupts, and could create no debt from the bankrupts to them. The petition must therefore be dismissed ; but the case being a hard one upon the petitioners, and one in which we should most willingly have assisted them, if the law had allowed us to do so, and the commissioner having sanctioned the appeal, it must be dismissed without costs.

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*Ex parte* LEONARD WARRINGTON.

In the Matter of JOHN SIMPSON LEAKE, a Bankrupt.

1853. February 25. March 11 & 23. Before the LORDS JUSTICES.

Advances made upon promissory notes not having more than twelve months to run, although further secured upon leaseholds by a contemporaneous agreement, *held* to be within the protection of the 2 & 3 Vict. c. 27, § 1.<sup>1</sup>

*Held* also, that, even if this were not so, such of the promissory notes as had not more than three months to run were within the 3 & 4 Will. 4, c. 98, which does not mention land, and that this enactment was not repealed or affected by the 2 & 3 Vict. c. 27.

An affirmative statute is not repealed by a subsequent affirmative statute, unless the two cannot stand together.

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<sup>1</sup> See *Lane v. Horlock*, 1 Drew. 587 ; *James v. Rice*, Kay, 281 ; but see *Fussell v. Daniel*, 10 Exch. 581 ; *Langton v. Haynes*, 1 H. & N. 366. All the statutes against usury are now repealed by the 17 & 18 Vict. c. 90.

THIS was a petition by way of appeal from the rejection \*160 by Mr. Commissioner PERRY of a proof tendered \* by the petitioner for 2500*l.*, upon five several promissory notes for 500*l.* each, dated respectively the 28th November, 1850, the 18th December, 1850, the 2d June, 1851, the 15th July, 1851, and the 24th September, 1851. The notes in question were all signed by the bankrupt John Simpson Leake and by Charles Leake and made payable to the petitioner. They all carried interest at 6*l.* per cent per annum, and they were made payable, as to the note of the 28th November, 1850, six weeks after date; as to the notes of the 15th July and 24th September, 1851, three months after date; as to the note of the 18th December, 1850, four months after date; and as to the note of the 2d June, 1851, twelve months after date.

The several sums made payable by these notes were in fact advanced by the petitioner to the bankrupt; and when the two first sums were respectively advanced, it was agreed by the bankrupt further to secure them by the deposit of a policy of insurance, and by a mortgage of some salt works at Wheelock and Hassall, of which the bankrupt was lessee under a Mr. Ackers.

Accordingly, on the 28th of November, 1850 (the day of the date of the first note), the following agreement was entered into between the Leakes and the bankrupt:—

“Memorandum of agreement made the 28th day of November, 1850, between John Simpson Leake, of Wheelock Hall, near Sandbank, in Cheshire, merchant, and Charles Leake, of Witney, in Oxfordshire, gentleman, of the one part, and Leonard Warrington, of Witney, aforesaid, of the other part. The said Leonard Warrington agrees to lend and advance to the said J. S. Leake and C. Leake 500*l.* at interest, in consideration whereof the said J. S.

Leake and C. Leake engage and agree forthwith to deposit \*161 \* with, and to assign and transfer to L. Warrington, a policy of insurance of and upon the life of the said John Simpson Leake in the sum of 5000*l.* granted by the Norwich Union Life and Fire Insurance Office; and also to grant to Mr. Warrington a mortgage security upon the salt works, lands, messuages, and premises of the said John Simpson Leake in and upon Wheelock and Hassall adjoining; the security to be made at the cost of Leakes, and to be subject to the present subsisting incum-

brances upon the said salt works and premises. (Signed) JOHN S. LEAKE, CHARLES LEAKE."

At the back of this memorandum was the following note :  
 " Mr. Warrington engages not to part with or require payment of the note of hand for 500*l.* and interest given by J. S. Leake and Charles Leake, within named, for that amount, without giving them two months' notice to pay the same."

Although the above agreement in terms extended only to the first sum of 500*l.*, it was admitted by the petitioner, in his examination, that the second sum of 500*l.* was also lent upon the faith of it.

In pursuance of the agreement, the policy (which was dated the 9th of December, 1850), was about the time of its date delivered by the bankrupt to the petitioner ; and afterwards, by a deed dated the 19th of February, 1851, the leases of the salt works and the policy were assigned by the bankrupt to the petitioner by way of mortgage, for securing the sum of 2400*l.* and interest at 6*l.* per cent per annum. This sum of 2400*l.* was made up of the two sums of 500*l.* advanced upon the above notes, and of two other sums of 400*l.* and 1000*l.*, in which the bankrupt had been previously indebted to the petitioner.

\* The securities for the sums made payable by the first two \* 162 notes having thus been perfected, the petitioner afterwards agreed to advance the bankrupt the further sum of 1500*l.*; and on the 5th of May, 1851, the following agreement was entered into in relation to the further advance:—

" Memorandum of having arranged with Mr. Leonard Warrington for a further advance of 1500*l.*, at 6 per cent interest, with a bonus of 300*l.* in case the first year's profits are under 1500*l.* upon the new part of the Whitehall Works, but 400*l.* in case they are above that. Said advance to be made in the following manner, namely, 500*l.* this present month, 500*l.* on the 1st of July next, 500*l.* upon the 1st of October next. Mr. Warrington is to decide after inspecting the books a year hence whether the bonus shall be 300*l.* or 400*l.*, and J. S. Leake will be bound by his decision, and also as to where that said bonus shall be paid ; that is to say, Mr. Warrington, upon inspecting the accounts a year hence, shall decide."

The sums made payable by the notes of the 2d of June, 1851, the 15th of July, 1851, and the 24th of September, 1851, were advanced in pursuance of this agreement. Although the agreement was silent in its terms as to any security for these sums, it was admitted by the petitioner in his examinations that they were advanced on the promise of security being given on the leasehold property comprised in the mortgage of the 19th February, 1851, and accordingly, by a deed dated the 2d October, 1851, the leasehold premises were charged with the further sum of 1500*l.* and interest at 6*l.* per cent per annum.

\* 163 The bankruptcy took place in May, 1852, and upon \* an application by the petitioner to prove in respect of these notes, the proof was rejected by the commissioner upon the ground of usury.

The petitioner appealed from this decision.

*Mr. Lloyd* and *Mr. Giffard*, in support of the appeal. — The question resolves itself into two : first, as to the notes payable at not more than three months' date ; secondly, as to the others. As to the first, there can be no substantial argument, for notes at three months are expressly exempted from the operation of the 12 Anne, c. 16, by the 3 & 4 Will. 4, c. 98, § 7, which is perfectly general, and says nothing as to security on land. It simply provides that from and after the passing of the Act no bill of exchange or promissory note made payable at or within three months after the date thereof, or not having more than three months to run, shall, by reason of any interest taken thereon or secured thereby, or any agreement to pay, or receive, or allow interest in discounting, negotiating, or transferring the same be void : nor shall the liability of any party to any bill of exchange or promissory note be affected by reason of any statute or law in force for the prevention of usury ; nor shall any person or persons, drawing, accepting, indorsing, or signing any such bill or note, or lending or advancing any money, or taking more than the present rate of legal interest in Great Britain and Ireland respectively for the loan of money on any such bill or note, be subject to any penalties under any statute or law relating to usury, or any other penalty or forfeiture, any thing in any law or statute relating to usury in any part of the United Kingdom to the contrary notwithstanding.

\* On this part of the case the only semblance of an argu- \* 164  
 ment that has been adduced in any of the cases has been  
 that the Act 3 & 4 Will. 4, c. 98, has been in substance repealed  
 by the 2 & 3 Vict. c. 37, and the subsequent renewals of that Act;  
 but in *Clack v. Sainsbury*, (a) it was held otherwise, Mr. Justice  
 MAULE saying, "I think, notwithstanding the subsequent Acts,  
 the Statute 3 & 4 Will. 4, c. 98, § 7, is in full operation." "The  
 Statute 2 & 3 Vict. c. 37 took a step in advance in relaxation to  
 the usury laws, to enable certain things to be done which before  
 could not be done. It legalized contracts for the loan or forbear-  
 ance of money above 10*l.* where a greater amount of interest than  
 5*l.* per cent was contracted for, except where the loan was made  
 upon the security of land." And Mr. Justice WILLIAMS saying,  
 "It is enough to say that the Statute 3 & 4 Will. 4, c. 98, § 7, is  
 in full operation, notwithstanding the Statute of 2 & 3 Vict. c. 37,  
 and the subsequent statutes for its continuation." In *Nixon v.*  
*Phillips*, (b) Mr. Baron PARKE said, "This question is in fact  
 decided by the recent case in the Court of Common Pleas, and  
 with that decision I find no reason to quarrel. It was most prob-  
 ably an oversight on the part of the legislature in putting money  
 secured by bills of exchange and promissory notes upon the same  
 footing as money secured by land; but we must construe the Act  
 of Parliament according to its obvious meaning." But if we are  
 right in our construction of the 2 & 3 Vict. c. 37, as to the notes  
 payable beyond three months, this question would be immaterial.  
 The 2 & 3 Vict. c. 37, § 1, enacts, "that no bill of exchange or prom-  
 issory note, made payable at or within twelve months after the  
 date thereof, or not having more than twelve months to \* run \* 165.  
 nor any contract for loan or forbearance of money above  
 the sum of 10*l.* sterling, shall, by reason of any interest taken  
 thereon, or secured thereby, or any agreement to pay or receive  
 or allow interest in discounting, negotiating, or transferring any  
 such bill of exchange or promissory note, be void, nor shall the  
 liability of any party to any such bill of exchange or promissory  
 note, nor the liability of any person borrowing any sum of money  
 as aforesaid, be affected by reason of any statute in force for the  
 prevention of usury; nor shall any person or persons, or body  
 corporate, drawing, accepting, indorsing, or signing any such bill

(a) 11 C. B. 711.

(b) 7 Exch. 192.



or note, or lending, advancing, or forbearing any money as aforesaid, or taking more than the present rate of legal interest in Great Britain and Ireland respectively, for the loan or forbearance of money as aforesaid, be subject to any penalties under any statute or law relating to usury, or any other penalty or forfeiture, any thing in any law or statute relating to usury, or any other law whatsoever in force in any part of the United Kingdom to the contrary notwithstanding. Provided always, that nothing herein contained shall extend to the loan or forbearance of any money upon the security of any lands, tenements, or hereditaments, or any estate or interest therein." Now bills of exchange and promissory notes, of not more than twelve months' date, being clearly exempted from the usury laws by the first part of this section, does the subsequent part invalidate such bills or notes? Clearly not. Even if a collateral security upon land, for the amount for which such bill or note may be given, should be held void (which is by no means clear, and is not now in dispute), the proviso does not all apply to the bills or notes themselves. If the statute meant to put bills and notes on the same footing as other contracts, why should they have been specified? And why should

\* 166 they be restricted to twelve months' date? \* *Berrington v.*

*Collis* (a) may be cited on the other side; but there the bill was given merely collusively and in fraud of the Act.

They also referred to *Doe v. King*, (b) *Bell v. Coleman*, (c) *Follett v. Moore*, (d) *Washbourn v. Burrows*. (e)

March 23.

The case stood over to this day, for the examination of the petitioner *vidé voce*. He was accordingly examined. The substance of his deposition has been already stated.

*Mr. Swanston* and *Mr. G. L. Russell*, for the assignees.—*Mr. Warrington's* examination has confirmed the correctness of the commissioner's decision, and has shown that the security was in substance upon the land as the primary and substantial security, and that the notes were merely something in addition. The case therefore falls precisely within the authority of *Berrington v.*

(a) 5 Bing. N. C. 332.

(d) 4 Exch. 410.

(b) 11 M. & W. 333.

(e) 1 Exch. 107.

(c) 2 C. B. 268.

*Collis*, (a) where Lord Chief Justice TINDAL said, "As the loan in the present case was not in our opinion really made upon the security of the promissory note, the discount taken makes the debt invalid, and consequently we think the warrant of attorney given for such illegal debt is invalid also." *Nixon v. Phillips* has been cited in opposition to *Berrington v. Collis*; but the Court there did not seem to consider that they were contravening the law as laid down in the other case. The contract for the forbearance is one, and cannot be divided into a loan or forbearance upon the bill or note, and another upon the \* security of \* 167 land. If, therefore, in any case security upon land is taken, the case is expressly exempted from the protection of the 2 & 3 Vict. c. 37, § 3, by the last part of the clause. How can it be said here that this is not a loan or forbearance of money upon the security of land? The Act does not say security for land "where such security is the only or principal security." The appellants wish to add these words to the proviso.

It cannot, therefore, be said that the bills and notes at more than three months' date can be valid. But we contend that the others are of no greater validity. This part of the case depends upon the question, whether the legislature really could have meant to leave in operation two inconsistent enactments, or whether the Act of 2 & 3 Vict. does not include and absorb the provision of the Act of 3 & 4 Will. 4, extending it to bills of longer date, but excluding from the provision all loans upon the security of land. We submit with confidence that the latter is the true construction of the statutes.

*Mr. Giffard*, in reply.—As to the contract for forbearance being indivisible, that argument is inconsistent with the established law. In *Mason v. Bogg*, (b) it was held, that even in the administration of assets of a deceased person, a mortgagee might prove upon the covenant as a distinct contract without affecting the security upon the land. The usual course of business has been, since the passing of the 2 & 3 Vict. c. 37, to take warrants of attorney as collateral securities to bills of exchange, a course \* adopted upon the best advice. *Connop v. Meaks*. (c) \* 168 The securities upon the land here do not refer to the bills;

(a) 6 Bing. N. C. 338.

(c) 2 A. &amp; E. 326.

(b) 2 M. &amp; C. 443.

they are in every respect collateral securities, the loans being made *bond fide* upon the bills.

The Lord Justice TURNER, after stating the facts of the case in the terms which have been adopted in the foregoing statement, proceeded as follows : —

The question to be considered is, whether, in the present state of the law as to usury, the proof upon these notes, or any of them, ought to have been rejected. Upon the argument of the case, the question, as it applies to the notes payable at and within three months, and to the notes payable at periods beyond three months, was properly distinguished. There are considerations which apply to the one class, which do not apply to the other. The Statute 3 & 4 Will. 4, c. 98, can in no case have any bearing upon the question as it affects the notes payable beyond the period of three months. It may, if in force, materially affect the question as to the notes payable at or within three months. In determining the case, therefore, I shall pursue the division which was taken in argument, and I will first consider the case as to the notes payable beyond the three months. Before doing so, however, it may be well to observe that it was not disputed in argument, and cannot, indeed, be denied, that all the notes, whether payable at three months or afterwards, would have been void under the statute of Anne; and that if valid at all, they must derive their validity from the subsequent statutes.

To consider the case, then, as to the notes payable beyond  
 \* 169 three months, the question as to these notes \* must depend entirely upon the Statute 2 & 3 Vict. c. 37.

[His Lordship read it. (See *ante*, p. 164.)]

The enactment, therefore, clearly validates the notes. Does, then, the proviso invalidate them in consequence of their being connected with security upon land? I do not think that it does. The terms of the proviso are, “nothing herein contained shall extend,” &c.; and these terms seem to me to import no more than they express, that that Act should not extend to loans upon the security of lands; a provision rendered necessary in the view of the legislature by the previous enactment, that no contracts for

loans should be void by reason of any interest secured thereby. The true meaning of the Act, as it seems to me, is simply this. The statute of Anne has invalidated all contracts and securities for loans at interest beyond 5*l.* per cent per annum, whether upon land or otherwise. This Act, if uncontrolled, would validate all contracts for loans, and therefore contracts for securities, whether on land or otherwise, whatever the rate of interest may be ; and therefore the Act provides that it shall not extend to loans upon the security of land, such securities being intended to be left as they stood under the statute of Anne, which avoids them if the interest be reserved at a rate exceeding 5*l.* per cent per annum. This construction of the Act fully carries out, as I think, the intention of the legislature ; for the legislature clearly intended to validate twelve months' bills, whatever the rate of interest might be, and they as clearly intended not to validate securities in land to any further extent than they were valid according to the then existing law. In my opinion, therefore, these bills are valid, and must be admitted to proof. The question may well be tested thus. Suppose securities, not upon \* land, to have been \*170 given with these bills, could it be contended that such securities were void in the face of the enactment, that no contracts for the loan or forbearance of money should be void by reason of any interest secured thereby ? And if the securities could not be void, how could the bills be held to be so ?

The remaining question is, whether the bills payable at or within three months ought also to be admitted to proof ; and if the construction which I have put upon the statute of Victoria be right, I think it clear that they ought, for they cannot be put in a worse position than to be brought under the provisions of that statute. I think, however, that, even if the construction of the statute of Victoria were otherwise, these bills would be valid under the Statute 3 & 4 Will. 4, c. 98. It was indeed argued, although but faintly, that this statute was repealed, or, as it is termed in some of the cases, absorbed by the Statute 2 & 3 Vict. c. 37 ; and it is true that the latter statute, extending to all bills payable within twelve months, includes within its provisions the bills payable within three months which are mentioned in the former statute ; but it does not, therefore, in my opinion, follow that the former statute is repealed or absorbed by the latter.

To determine that point, we must look at the intention of the

legislature. Now, the Statute 2 & 3 Vict. c. 37 recites the Statute 7 Will. 4 & 1 Vict. c. 80, and that statute recites the 3 & 4 Will. 4, c. 98. The Statute 3 & 4 Will. 4, c. 98, must therefore have been present to the mind of the legislature when the Statute 2 & 3 Vict. c. 37 was passed; and had it been intended that it should be repealed or absorbed, that intention would surely have been expressed. But further, these statutes, though expressed in  
 \* 171 the negative, are so \* expressed only on account of the provisions of the statute of Anne. They are in the negative as to that statute, but, *inter se*, they are affirmative statutes; and I take the rule of law to be, that an affirmative statute is not, without express words, repealed by a subsequent affirmative statute, unless the two statutes cannot stand together; and these two statutes may well stand together, for the proviso in the second statute is not that three months' bills secured on land shall be void, but only that nothing in the second statute contained shall extend to loans on the security of land.

Supposing, therefore, these three months' bills to be struck at by the 2 & 3 Vict. c. 37 (but which I do not think is the case), they would be good under the statute of William, unless indeed that statute bears the construction contended for by the appellant, that it applies only where there is no other security than the bill. I cannot, however, adopt that construction. The statute in terms validates all three months' bills; and I can see no grounds for introducing into it the qualification, that it shall extend to such bills only when they are not otherwise secured; nor do I think it was necessary that such a qualification should be introduced. This statute, like the statute of Victoria, might, as it seems to me, well have been construed to have left any securities beyond the bills to be affected by the statute of Anne.

The cases of *Clack v. Sainsbury* (a) and *Nixon v. Phillips*, (b) which were cited in the argument, support the conclusion at which I have arrived, that the statute of William has not been repealed by the statute of Victoria. These cases, and others which were  
 cited in the argument, contain *dicta* with which, as at  
 \* 172 present advised, \* I should hesitate to agree; but none of them go to the length of deciding that the bills which were in question in them were void. The nearest approach to the inti-

(a) 11 C. B. 711.

(b) 7 Exch. 188.

mation of such an opinion is in the case of *Berrington v. Collis*, (a) which was much relied on upon the part of the respondents; but in that case the Court acted upon the conclusion, that the bills of exchange were merely colourable; so that, in truth, there was no loan upon the bills, which is certainly not the case in this instance, as the notes in question here were undoubtedly part of the petitioner's security. So far from the bills having been held to be void in the other cases, the Courts in most of them have held (and it is not necessary now to determine whether we should assent to or dissent from that holding) that the collateral securities were to be supported upon the very ground that the bills were valid; and in *Bell v. Colman* (b) it was distinctly intimated that an action might have been brought upon the bills, and the land taken by *elegit*.

Our opinion therefore is, that the proof of these notes against the estate of the bankrupt must be admitted.

THE LORD JUSTICE KNIGHT BRUCE.—I have considered this case and the authorities that during the argument were referred to. The question is one of proof merely, and the single ground on which it was or could have been contended that the bills or notes sought to be proved were not provable, was that of usury. But, as this objection was met by the Statute 3 & 4 Will. 4, c. 98, § 7, and the Statute 2 & 3 Vict. c. 37, the respondents were under the necessity of maintaining that the securities taken by the petitioner for the payment of the bills or notes (securities wholly or in \* part upon "lands, tenements, or hereditaments, or" \* 173 some "estate or interest therein") had the effect of depriving the petitioner of the statutory protection, which, accordingly, has been the point of the controversy. The petitioner, however, claims nothing under any one of these securities. Asserting no mortgage charge or lien, he desires to prove his alleged debt in full as an unsecured debt. Whether the securities, therefore, are or were wholly good, or wholly bad, or partly good and partly bad, is not to be decided.

The question is of the validity or invalidity of the bills or notes, as bills or notes merely; and I am of opinion that they are not, and that not one of them is invalidated or impeached by the securities,

(a) 5 Bing. N. C. 332.

(b) 2 C. B. 268.

whether to be treated or viewed as wholly contemporaneous, or in any other manner. I am convinced that the bankrupt, at the time of his bankruptcy, had no defence legally or equitably available against an action upon the bills or notes. The concluding proviso of the first section of the latter statute may invalidate mortgages, charges, and liens under certain circumstances, but, in my opinion, does not defeat or impeach the validity of any bill or note described in the body of the section, taken as these bills or notes appear to me to have been taken, *bond fide*, not colourably, nor by way of shift or evasion; though interest, at howsoever higher a rate than 5l. per cent per annum, was formally and expressly, as well as substantially, contracted for, and a landed security by writing or deposit, or both, for the payment of the bill or note was contemporaneously (whether effectually or ineffectually) given.

The petitioner is therefore, I think, right in his present contention, as to each of his bills or notes; and the bankrupt's estate should, I think, bear the costs of the petition \* upon each side, including the reasonable expenses of the petitioner as a witness summoned and examined *visd voce* before us. Proving, he must give up the documents which are or profess to be securities for the bills or notes.

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*Ex parte* ANNE GRIFFITHS and GRIFFITH GRIFFITHS.<sup>1</sup>

In the Matter of EDWARD MOSTYN LLOYD MOSTYN, a Bankrupt.

1853. March 4 & 8. Before the LORDS JUSTICES.

The obligee in a bond given by a trader recovered judgment upon it after the obligor had ceased trading. *Held*, that the bond debt was not so merged in the judgment as to preclude the obligee from petitioning for adjudication against the obligor.\*

*Held*, also, that such a judgment was a good foundation for an act of bankruptcy under the 72d section, having for this purpose relation to the trading, and

<sup>1</sup> S. C., 17 Jur. 655; 22 L. J., Bank. 50.

\* See *Ex parte* Higgins, 3 De G. & J. 33.

that the notice under that section was correct, although it required payment of the judgment, and not of the bond.<sup>1</sup>

*Held*, further, that a member of Parliament may become bankrupt under the 72d section of the Act.

Where the Court, differing from the commissioner, and holding the petitioning creditor's debt to be sufficient, referred back to him the question of the validity of the adjudication, an application for leave to appeal to the House of Lords from the decision as to the sufficiency of the debt was held premature, and was ordered to stand over till the commissioner should have given his decision.

THIS was the appeal of the petitioning creditors from the decision of Mr. Commissioner PERRY, who had annulled the adjudication on the ground that there was no such petitioning creditor's debt as would support it. The trading was that of wharfinger and lime-burner, and continued down to 1848. The petitioning creditors were the obligees in a bond given by the bankrupt in 1839, but had recovered judgment upon it in 1850, after the trading had ceased. The act of bankruptcy relied upon was, default in paying or securing the judgment debt after notice given in conformity with the terms of the 72d section of the Bankrupt Law Consolidation Act, 1849. The notice required immediate payment of the \* judgment debt. The commissioner held \* 175 that the bond debt was merged in the judgment, and that the judgment debt, having accrued after the trading had ceased, would not support the adjudication. From this decision the petitioning creditors appealed.

*Mr. Bacon* and *Mr. Aspland*, in support of the appeal, referred to *Ex parte Bryant*, (a) *Bryant v. Withers*, (b) *Ex parte Mudie*, (c) *Ambrose v. Clendon*, (d) *Dawe v. Holdsworth*, (e) *Price v. Moulton*, (g) *Drake v. Mitchell*, (h) *Bell v. Banks*. (i)

*Mr. Swanston*, *Mr. Bramwell*, and *Mr. Vaughan Williams*, for the respondent, contended, 1st, that the petitioning creditor's debt was not sufficient; 2dly, that, even if a judgment recovered after

(a) 1 V. & B. 211.

(c) 3 Mont. D. & De G. 66.

(b) 2 M. & S. 123.

(d) 2 Str. 1042; Lee's Rep. 257, *temp.* Hardwicke.

(e) Peake, 64.

(h) 3 East, 251.

(g) 10 C. B. 561.

(i) 3 M. & Gr. 258.

<sup>1</sup> See *In Re The London and Eastern Banking Corporation*, 2 De G. & J. 484.



the trading had ceased was a good petitioning creditor's debt, it was not a good foundation of an act of bankruptcy under the Bankruptcy Law Consolidation Act, § 72; 3dly, that at all events the notice proceeding upon the judgment, and not upon the bond, could not be good; and 4thly, that the provisions of the 72d section did not apply to traders having privilege of Parliament. Their arguments appear sufficiently from the judgments. They cited *Medlicott's Case*, (a) *King v. Hoare*, (b) *Ex parte Christy*, (c) *Bonafous v. Schoole*, (d) *Peters v. Anderson*. (e)

*Mr. Bacon*, in reply, was stopped by the Court.

\* 176 \*THE LORD JUSTICE KNIGHT BRUCE. — The state of circumstances which must be assumed to exist for the purposes of the contention before us is this, that a person in trade contracting a debt gave a bond, which became forfeited; that after the forfeiture he left off trading; and that after he had left off trading judgment was recovered against him on the bond. The question argued was, whether the obligees were, in this assumed state of circumstances, competent petitioning creditors. I should have thought, and I still think, that the cases of *Ambrose v. Clendon*, (g) *Dawe v. Holdsworth*, (h) and *Ex parte Bumford*, (i) as well as others, clearly decided this case.

I apprehend that by the spirit and intent of the bankrupt laws, according to principle equally and authority, these two rules are clearly established: first, that a trader who, after becoming indebted, leaves off trading, is not to be heard to say to his creditor that the trading has been left off, if a question arises whether the debtor can or cannot be as a trader made a bankrupt; secondly, that a bond, in the case of a simple contract, or a judgment, in the case of a specialty, which for many purposes extinguishes (though not satisfying) the original debt, does not do so as against the creditor, for the purpose of disabling him from making his debtor a bankrupt on the original debt, remaining in every sense or in every other sense unsatisfied. I believe that no lawyer will now

(a) 2 Str. 899.

(b) 13 M. & W. 494.

(c) 2 Dea. & Ch. 155.

(g) 2 Str. 1042; Lee's Rep. 257, temp. Hardwicke.

(h) Peake, 64.

(d) 4 T. R. 316.

(e) 5 Taunt. 601.

(i) 2 Madd. 1.

dispute either of these propositions, and I think that this case falls within them.

The only remaining question is, whether there has been here an act of bankruptcy. This debtor has privilege \* of \* 177 Parliament. The 72d section of the Act provides, that "if any plaintiff shall recover judgment in any action personal for the recovery of any debt or money demand in any of her Majesty's Courts of Record against any such trader" (that has been done here, the judgment has been recovered, and the defendant must be taken to have been a trader for the reasons which I have mentioned), "and shall be in a situation to sue out execution upon such judgment" (that is here the case), "and there be nothing due from such plaintiff by way of set-off" (it is not alleged that there was any set-off), "and such trader shall not within seven days after notice in writing personally served upon such trader, requiring immediate payment of such judgment debt, pay, secure, or compound for the debt for the same to the satisfaction of such plaintiff, every such trader shall be deemed to have committed an act of bankruptcy on the eighth day after service of such notice." The trader has not paid, secured, or compounded in the manner required by the Act. This is not contended. But it is said that the notice given is insufficient, although it follows the terms of the Act, as it should have required payment of the bond debt and not of the judgment debt. But the debt was a judgment debt, although under peculiar circumstances. No one concerned in the matter could fail to know what the demand was, in respect of which the notice was given.

THE LORD JUSTICE TURNER. — I quite concur in the opinion of my learned brother. However this matter might have stood apart from authority, it seems to me that the cases of *Ambrose v. Clendon* and *Dawe v. Holdsworth* are decisive on the point. The distinction attempted to be made between these cases and the present, or at least between *Ambrose v. Clendon* and the present case, proceeded on this ground, \* that in *Ambrose v. Clendon* the \* 178 bankruptcy occurred between the time of contracting the original debt, and the taking of a higher security; and that therefore the argument, that the subsequent judgment destroyed the original debt, did not there apply, inasmuch as the bankruptcy overrode and excluded the merger or conversion. I do not agree

with this argument. It was admitted, and I think that the result of the cases is, that where a debt exists in the shape of a judgment, it must be considered to be due in respect of the original debt for the purpose of supporting the bankruptcy.

It is then said that the notice ought to have been given on the bond, but the debt is due on the judgment, though the bond comes in aid for the purpose of supporting the adjudication.

Then it is said that the respondent is not a trader under the 72d section of the Bankrupt Law Consolidation Act, because he ceased to trade in 1848 ; but as he has been a trader, and the debt existed during the trading, he must be considered as a trader still, so long as the debt is not paid.

It is lastly said he is a member of Parliament, and therefore not liable to this process, but I think it clear that no distinction can be drawn between different classes of traders, and the 66th section provides, that where a trader has privilege of Parliament, he may be dealt with under the Act in like manner as any other trader, except only as regards imprisonment.

It must be referred back to the commissioner to review his decision.

March 8.

On this day *Mr. Swanston* and *Mr. Vaughan Williams*, on behalf of the respondents, applied, under the 18th section of the Bankrupt Law Consolidation Act, 1849, for leave to appeal to the House of Lords.

\* 179 \* *Mr. Bacon* and *Mr. Aspland*, for the appellants, were not called upon.

The Lord Justice KNIGHT BRUCE thought the application unnecessary, as the question was merely as to the existence of the legal requisites, and could be tried in an action. His Lordship intimated that he should have been disposed to refuse the motion, but that the Lord Justice TURNER considered the right order would be to direct the application to stand over till the Commissioner had given his decision.

THE LORD JUSTICE TURNER. — The House of Lords would have just cause of complaint, if we sent them one question out of many

arising in a case, and a question which it may be immaterial to decide. In Scotch appeals, the course taken by the House is to direct any preliminary question to stand over until the whole case comes on.

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In the Matter of The NORTHAMPTON CHARITIES,

AND

In the Matter of the Act 5 & 6 WILL. IV. c. 76, and of The TRUSTEE ACT, 1850.

1853. January 12. Before the Lord Chancellor Lord CRANWORTH.

The jurisdiction conferred under the 71st section of the Municipal Corporations Act is not limited to the Lord Chancellor, but may be exercised by a Vice-Chancellor.

In this case, the Lord Chancellor made an order appointing new trustees, and observed that he did not think there was anything in the provisions of the Municipal Corporations Act which limited the exercise of such a jurisdiction to the Lord Chancellor only.

*Mr. Baggallay, Mr. Bennet, and Mr. Whitworth* appeared on the petition.

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\* In the Matter of The WORCESTER CORN EXCHANGE \* 180  
COMPANY,

AND

In the Matter of The JOINT-STOCK COMPANIES WINDING-UP ACTS, 1848 and 1849.

1853. January 31. February 9. Before the Lord Chancellor Lord CRANWORTH.

By the deed of settlement of a joint-stock company formed for the purpose of building a corn exchange, it was provided that the affairs of the company should be under the entire control of the directors, who should have power to create new shares and to borrow money under certain prescribed conditions: the deed also provided that the directors might make calls on the share-

holders as they should think fit, but not beyond the amount for the time being remaining unpaid of their respective shares. The capital of the company having been all called up and expended, the directors advanced out of their private funds and borrowed from other quarters (but not in conformity with the provisions of the deed) a sum sufficient to defray the extra expenditure which had been incurred. *Held*, on the winding-up of the company, that, as between the directors and the shareholders, the latter were not liable to contribute to such extra expenditure.<sup>1</sup>

Part of the moneys advanced had been lent by a bank, one of the partners in which was a shareholder in the company. *Held*, that, as between the company and the bank, the latter must be deemed to have had notice of the restricted liability of each shareholder, and consequently had no claim against the company for the advance.<sup>2</sup>

THE above company having been wound up, this was a motion, by way of appeal, on the part of Thomas Haskew and twelve other persons, from the decision of the Master, made on the 23d December, 1852, whereby the appellants were ordered to pay a call of five pounds per share. By the desire of the Vice-Chancellor STUART, the appeal was heard in the first instance by the Lord Chancellor. The following are the circumstances of the case.

<sup>1</sup> See *Cropper's Case*, 1 De G., M. & G. 147; *Gillan v. Morrison*, 1 De G. & S. 421; 1 *Lindley Partn.* (Eng. ed. 1860) 632, 633. But the cases of *Ex parte Chippendale*, 4 De G., M. & G. 19, and *Ex parte Bignold*, 22 Beav. 143, appear to have a contrary bearing. See 1 *Lindley Partn.* (Eng. ed. 1860) 629-632; *In re International Life Assurance Society*, L. R. 10 Eq. 312.

<sup>2</sup> That notice to one partner is notice to the firm, see *Alderson v. Pope*, 1 Camp. 404, n.; *Ex parte Warthman*, 1 Mont. & A. 374; *Story Partn.* § 107; *Lansing v. M'Killup*, 7 Cowen, 416; *Gilley v. Singleton*, 3 Litt. 249; *Watson v. Wells*, 5 Conn. 468; *Powell v. Waters*, 8 Cowen, 670; *Fitch v. Stumps*, 6 How. (Miss.) 487; *Hayward v. Harmon*, 17 Ill. 477; *Miser v. Trovinger*, 7 Ohio St. 281; *Darling v. March*, 22 Maine, 184; *Dabney v. Stidger*, 4 Sm. & M. 739; *Union Bank of Weymouth and Braintree v. Willis*, 8 Met. 511, 512; *Barney v. Currier*, 1 D. Chip. 315; 1 *Lindley Partn.* (Eng. ed. 1860) 230; *Collyer Partn.* (5th Am. ed.) § 443. That a creditor, who has express notice of a private arrangement between partners, by which either the power of one partner to bind the firm, or his liability in respect of partnership contracts is qualified or defeated, is bound by it; see *Dow v. Sayward*, 12 N. H. 275; *Bromley v. Elliot*, 38 N. H. 303; *Ensign v. Wands*, 1 John. Cas. 171; *Hastings v. Hopkinson*, 28 Vt. 108; *Grave v. Cadwell*, 5 Cowen, 489; *Baxter v. Clark*, 4 Ired. Law, 129; *Boardman v. Gore*, 15 Mass. 339; *Bailey v. Clark*, 6 Pick. 372; *Story Partn.* §§ 128, 129, 130; *New York Fire Ins. Co. v. Bennett*, 5 Conn. 597, 598; *Pierson v. Stienmyer*, 4 Rich. 309; *Town v. Hendee*, 27 Vt. 258; *Livingston v. Roosevelt*, 4 John. 251; *Irby v. Vining*, 2 McCord, 379; 3 Kent (11th ed.) 43; 1 *Lindley Partn.* (Eng. ed. 1860) 267-269, 303; *Greenwood's Case*, *post*, 459; *Collyer Partn.* (5th Am. ed.) §§ 387, 388, 389.

The company was formed for the purpose of establishing a corn exchange in the city of Worcester. The deed of settlement was dated the 8th May, 1848, and was executed by fifty-three shareholders, representing five hundred and seventy-four shares. The company was completely registered in May, 1848.

By the eighth clause of the deed, the capital of the \* com- \* 181  
pany was to be 4000*l.*, divided into eight hundred shares of 5*l.* each: and the ninth clause provided for the increase of the capital of the company to the extent of 3000*l.* by the creation of new shares.

✓ The fifty-fourth clause provided, "That, subject and without prejudice to the powers given to the general meeting of the company, the directors shall have the entire management of and superintendence and control over the affairs and concerns of the company, and may make such rules and regulations for that purpose and for the guidance of the officers and servants of the company as they may think fit, and shall in all cases provided for in these presents act in strict conformity to the laws and regulations hereby established or hereinafter to be established by the general meetings; but in all cases unprovided for by these presents or by any general meeting, it shall be lawful for the directors to act in such manner as shall appear to them best calculated to promote the welfare of the company." ✓

The sixty-first clause provided, "That it shall be lawful for the directors, if they shall think it expedient so to do, to borrow the whole or any part of the sum which they may contract to give for the purchase of any piece or parcel of ground on behalf of the company, and to convey the land so purchased, with the buildings which may be subsequently erected thereon, unto the person or persons willing to lend or advance the same, or unto the vendor or seller of such land if he shall be willing to permit the purchase-money or any part thereof to remain on mortgage thereof, as a security for the repayment of such money with interest for the same after such rate as shall be agreed upon."

The sixty-second clause provided, "That, if at any  
\* time after any pieces of land or ground or other property \* 182  
shall have been purchased or taken, any sum or sums of money shall be wanted for the purpose of erecting, building, completing, enlarging, or altering the exchange and other buildings hereinbefore authorized to be erected, built, enlarged, or altered,

or any of them, or any part thereof, or for any other purposes of the company, it shall be lawful for the directors, if they shall think it expedient so to do, instead of raising the same by calling for any further instalment, under the authority hereinafter contained, to borrow and take up the same at interest from any person or persons who may be willing to lend or advance the same, and to give such security for payment thereof, either by mortgage of all or any of the land, exchange, and other buildings or other property of the company, or by a bill or bills of exchange accepted by any one or more of the directors of the company, either individually, or for or on behalf of the company, or in any other way which the directors may think fit; and the funds of the company shall in all cases be liable for the payment of the money so borrowed, and the interest thereof, and shall and may be applied by the directors in discharge and satisfaction of the same; and the directors who may join in any such mortgage or security, or to give or accept any such bill of exchange, shall be indemnified from all liability in respect thereof. Provided always, that in case the directors shall think it expedient to borrow any such sum or sums as aforesaid in the name and on the behalf of the company, they shall at the next general meeting (if the same shall be held within the space of six calendar months next thereafter, and if not, then at a special general meeting to be called for such purpose within the said space of six calendar months) report to such

meeting the sum or sums which shall be so borrowed, and  
 \*183 the nature of the security which shall have been \*given for the same, and the reasons which have induced the directors to pursue such a course. Provided further, that the sum and sums of money which may be borrowed and taken up at interest by the directors in the name of or on behalf and for the purposes of the company under the authority of this provision, shall not (including such part of the purchase-money, if any, as may remain on the security of the premises) at any one time exceed in the whole the sum of 2000*l*."

( The hundred and sixteenth clause provided, " That it shall be lawful for the directors from time to time to make such calls for money upon the shareholders, to defray the expenses of or otherwise to carry on the said undertaking, as they shall think fit, but not beyond the amount for the time being remaining unpaid of their respective shares."

At the first general meeting of the company, held on the 13th March, 1849, the report of the directors, which on the whole was not very encouraging, contained the following passage: "It cannot, however, be concealed that the subscribed capital will be insufficient to defray the expenditure." On the 12th March, 1850, the second annual report of the affairs of the company was made, and by this it appeared that the company was in difficulties: the following passage occurred in the report: "It appears that, in order to meet the liabilities of the company, each shareholder will be required to contribute an amount rather larger than he has already subscribed."

The difficulties into which the company had fallen were attributable to the cost of the building greatly exceeding the contract price. The directors at one time contemplated the creation of new shares, to relieve the company of its embarrassment; but this not being responded \* to by the general body, the \* 184 directors advanced out of their own moneys and borrowed from other quarters the sum necessary to liquidate the pressing claims of the creditors.

On the 17th July, 1850, a general meeting took place, at which it was resolved that a declaration of insolvency should be filed; and a petition to wind up the affairs of the company was immediately afterwards presented to the Vice-Chancellor KNIGHT BRUCE by one of the shareholders. It being referred to the Master to report upon the expediency of dissolving and winding up the affairs of the company, he was of opinion that it was necessary and proper that the same should be dissolved and wound up.

It appeared that the full amount of 5*l.* per share had been called up and paid upon the whole of the subscribed capital, and that the debts and liabilities of the company amounted to 2729*l.*, and that a considerable portion of that sum had been advanced by a banking firm, one member of which was a shareholder in the company. The official manager submitted to the Master that a sum of not less than 5*l.* per share ought to be called up from all the shareholders, in order to satisfy the remaining debts of the company. The Master having made the call as proposed by the official manager, the present appeal was presented.

*Mr. Daniel* and *Mr. Selwyn*, for the appellants.—The directors have taken upon themselves to incur debts in a manner not author-



ized by the deed of settlement, and are alone responsible. *Burmester v. Norris*, (a) *Ricketts v. Bennett*. (b) The appellants are not legally liable either as between themselves and the directors, or the creditors, and ought not to have been placed on the

\* 185 \*list of contributories for any sum beyond the paid-up amount of the shares. One of the members of the bank to which the greatest portion of the debt is owing, being also a member of the company, the bank will be presumed to have had notice of the restricted liability of each shareholder. [They also referred to the case of *Hallett v. Dowdall*. (c)]

*Mr. Glasse* and *Mr. Smythe*, for the official manager. — The reports at the two general meetings of the company were sufficient to apprise the shareholders of the state of the concern, and of the necessity for raising more money to discharge its liabilities. According to the fair interpretation of the sixty-second clause of the deed, the directors only exercised a sound and legitimate discretion in procuring the advance of the necessary funds; and in the absence of all imputation of fraud, they are in equity entitled to be recouped by the shareholders.

*Mr. Daniel* replied.

THE LORD CHANCELLOR. — This is a very distressing case, because a heavy loss has been incurred, and must fall on some innocent persons. It appears that the shareholders in this company engaged in a speculation for building a corn exchange, and that such speculation has been a total failure: the question is on whom the loss is to fall. There is no suggestion whatever as to misconduct or mismanagement on the part of the directors. It is quite clear, that, as between the shareholders and the directors, all that is to govern their respective liabilities is to be discovered in the deed which they have entered into: that alone must regulate their rights *inter se*.

The appellants contend that the deed which they have  
\* 186 \*executed restricted their liability to five pounds per share, and that, being only liable to that amount, they have already paid it up in full. On the part of the directors, it was said that they have expended much more, and that they are entitled to call

(a) 6 Exch. 796.

(b) 4 C. B. 686.

(c) 16 Jur. 462.

on each shareholder to contribute towards that excess of expenditure, and in short to pay ten pounds instead of five pounds. No doubt such further sum has been expended; but the question is, are the shareholders who are not directors liable for such expenditure? I am of opinion that they are not.

First, as between the shareholders and directors, they are clearly not liable, because the deed stipulates in the strictest way that five pounds per share only should be called up. [His Lordship here read the hundred and sixteenth clause above set out.] The plain meaning is, that among themselves each shareholder should pay that sum and no more; and if there was nothing else in the case, I think their liability would clearly be restricted to five pounds per share. The official manager has referred to many clauses of the deed, to show that that was not the intention of the parties; but in my opinion he has failed to prove any more extended liability. All the clauses of the deed must, I think, be read with reference to the amount stipulated to be paid under the hundred and sixteenth clause, and which, in the aggregate, formed the limited amount of capital with which the directors had to deal. It is not in terms so expressed, but I see nothing in the deed to enable the directors to borrow money to an unlimited amount. It may be that the directors have incurred the liability, but there is nothing whatever to show that, as between them and the shareholders, the latter are liable.

It was contended, however, that this reasoning would not apply to claims as between the company and third \* persons; \* 187 that there were many outstanding creditors; and, among other claims, that there was a large debt to the bankers of the company. It is not necessary to deal with the question as to the creditors other than the bankers, because there is enough, independently of the debt to the bankers, to satisfy all other claims. Here the bank must be held to have had clear notice of the stipulations of the deed, and of the limited liability of each shareholder, for one of the partners in the bank was a shareholder in this company.

Even if that had not been so, and there had been no restricted liability by deed, I am strongly inclined to think, though it is not necessary for me so to decide, that there could be no liability to third parties in the present case, as it does not appear to be a trading partnership, in which, according to the law of merchants,

each partner would be responsible. If several persons should by parol agree among themselves to build a house, and that each should contribute a certain sum for that purpose, such an agreement not being within the principle of a trading partnership, one of them could not pledge the credit of the others *ultra* the stipulated sum.<sup>1</sup> The case of *Hallett v. Dowdall* (a) is a clear authority to show that the shareholders in this company are not liable for the debt owing to the bankers.

It was also urged that there had been on the part of the shareholders a subsequent ratification of the acts of the directors, but there appears to be no evidence whatever to support that allegation. There were general meetings of the company, but nothing which took place at such meetings altered the liability of the shareholders.

On the whole, therefore, I think, that even if this was a \* 188 trading concern (which, in my opinion, it \* was not), the appellants have incurred no liability to indemnify the directors against the claims of those creditors who had notice of the deed. I shall give no costs. The official manager will have his costs out of the estate.

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In the Matter of ROBINSON'S CHARITY,

AND

In the Matter of the Act 11 GEO. 4 & 1 WILL. 4, c. 70,  
and of The TRUSTEE ACT, 1850.

1853. February 26. Before the Lord Chancellor Lord CRANWORTH.

The Vice-Chancellors have jurisdiction to appoint trustees of charities in the place of the Judges of the Courts abolished by the Act for the more effectual administration of justice in England and Wales, 11 Geo. 4 and 1 Will. 4, c. 70.

THE Reverend John Robinson, formerly Vicar of Ruabon in the county of Denbigh, by his will, dated the 26th November, 1703, appointed the Bishop of St. Asaph and his successors, bishops there

(a) 16 Jur. 462; [S. C., 18 C. B. 2].

<sup>1</sup> See *Woodward v. Cowing*, 41 Maine, 9.

for the time being, and the Right Honorable the Chief Justice of Chester and his successors, and his associate justice, trustees of a charity established by the testator: the legal estate of the charity estates was by the will vested in the Vicar of Ruabon and his successors for ever.

The Act 11 Geo. 4 & 1 Will. 4, c. 70, intituled "An Act for the more effectual Administration of Justice in England and Wales," abolished the jurisdiction of the county palatine of Chester and principality of Wales, and thus destroyed the existence of two of the trustees; and by the thirty-first section it was provided, "That in all cases where any trust for charitable uses or of a public nature shall have been cast upon the Judges of the Courts hereby abolished, by virtue of their offices, it shall be lawful for the Lord High Chancellor or Keeper of the Seals for the time being, or for the Judges of Assize upon their circuits in the county of Chester or principality of Wales, to \* appoint such \* 189 other trustee or trustees as they shall think fit, by any writing under their hands, in place of the former Judge or Judges, which trustee or trustees so named shall have the same power and authority, and be subject to the same rules and duties, as the trustee or trustees for whom he or they may be substituted."

By the Act giving power to appoint two additional Vice-Chancellors, 5 Vict. c. 5, it is enacted (section 22), that "each such Vice-Chancellor shall have full power to hear and determine all causes, matters, and things which are or shall be at any time depending in the Court of Chancery in England, either as a Court of Law or as a Court of Equity, or incident to any ministerial office of the said Court, or which have been or shall be submitted to the jurisdiction of the said Court or of the Lord Chancellor by the special authority of any Act of Parliament, as the Lord Chancellor shall from time to time direct;" and by the 6th general order, of the 11th November, 1841, it is directed, "That all notices of motion not in any cause, and all petitions not in any cause, which are presented to the Lord Chancellor, shall be marked with the title of one of the Vice-Chancellors, and shall thenceforth be attached to such Vice-Chancellor's Court, unless removed therefrom by any special order of the Lord Chancellor."

A petition was presented in the matter of the Act 11 Geo. 4 & 1 Will. 4, c. 70, and the Trustee Act, 1850, by the Bishop of St. Asaph and the Vicar of Ruabon, for the appointment of new

trustees. This petition came on before Vice-Chancellor TURNER, upon the 22d December, 1852, when his Honor doubted whether he had jurisdiction, and whether the power in 11 Geo. 4 & 1 Will.

4, c. 70, § 31, was not limited specially to the Lord Chancellor: he therefore desired that an \* application should be made to the Lord Chancellor for his opinion on the question.

*Mr. J. R. Kenyon* now mentioned the case accordingly.

The Lord Chancellor expressed his opinion to be that the Vice-Chancellor had jurisdiction.

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### TAYLOR v. TAYLOR.

1853. May 28. June 2, 8. Before the Lord Chancellor Lord CRANWORTH.

A testator devised real estate to trustees upon trust to sell, and as to the moneys to arise by such sale, directed that they should sink into and be deemed part of the residue of his personal estate and be applied accordingly: he then bequeathed all the residue of his personal estate to the same trustees upon trust for his sons and daughters in equal proportions. One of the sons died in the testator's lifetime. *Held*, that the share of the deceased son in the produce of the real estate was to be deemed real estate and as undisposed of by the will, and that it went to the heir-at-law of the testator.<sup>1</sup>

The decision of Sir J. LEACH in *Phillips v. Phillips*, 1 M. & K. 649, overruled.<sup>2</sup>

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<sup>1</sup> If land is directed to be sold for specific purposes, and they fail, it will go to the heir as real estate. Or if after such purposes are accomplished, a surplus remains undisposed of, the heir will be entitled to it. See *Ackroyd v. Smithson*, 1 Bro. C. C. (Perkins's ed.) 514, 515 notes; *North v. Valk*, C. W. Dud. Eq. 212; *Bogert v. Hertell*, 4 Hill, 492; *Lewin Trusts* (5th Eng. ed.), 121 *et seq.* and cases cited; *Marriott v. Turner*, 20 Beav. 557; *Craig v. Leslie*, 3 Wheat. 577, 578, 579; *Pratt v. Taliaferro*, 3 Leigh, 419, 428; *Burr v. Sim*, 1 Whart. 252; *Lindsay v. Pleasants*, 4 Ired. Eq. 321, 323; *Nagle's App.* 1 Harris, 260; *Wood v. Cone*, 7 Paige, 472, 476; *Wood v. Keys*, 8 Paige, 365. As to the doctrine of lapse, see 1 *Jarman Wills* (3d Eng. ed.), 314 *et seq.* (4th Am. ed.), 310 *et seq.* and notes. Constructive conversion, see 1 *Jarman Wills* (3d Eng. ed.), 549 *et seq.* (4th Am. ed.) 481 *et seq.* and notes and cases.

<sup>2</sup> See *Shallcross v. Wright*, 12 Beav. 505; *Robinson v. London Hospital*, 10 Hare, 19.

WILLIAM TAYLOR, the testator in the cause, who died on the 4th June, 1849, by his will, dated the 2d December, 1848, after certain specific devises and bequests therein expressed, devised unto his wife Ann Taylor, John Seymour Taylor, and Richard Edwards, and their heirs, divers messuages, farms, closes, or parcels of land, tenements, and hereditaments situate in the tythings of Burwell, Denmead, Hambledon, and Glidden, and in the parish of Farlington, in the county of Southampton, and all other his real estate not thereinbefore devised, upon trust that they, or the survivors or survivor of them, should absolutely sell the same in manner therein mentioned; and as to the moneys to arise by such sale, he directed that the same should sink into and be deemed part of the residue of his personal estate, and be applied accordingly. And after certain further specific bequests therein expressed, the testator bequeathed unto his wife and J. S. Taylor and R. Edwards all the residue of his \* personal \* 191 estate and effects, and all other personal property over which he had any disposing power (after payment of his debts and funeral expenses, and the costs of proving and executing his will, and the legacies thereinbefore bequeathed, and the costs of the performance of the trusts therein mentioned), upon trust that they, his said wife and the said J. S. Taylor and R. Edwards, and the survivors and survivor of them, should receive and convert into money all such parts of the said personal estate as should not consist of moneys or securities for money, and should stand possessed of the proceeds thereof, and of all other the residuum of his personal estate and of the personal property he might have the power to appoint, and of the moneys to arise from the sale of his real estate, upon trust for his (the said testator's) sons and daughters, namely, Henry Taylor, Edward Taylor, the said J. S. Taylor, Horatio Percy Taylor, Anna Taylor, Caroline Emma Taylor, and Emily Edwards, in equal proportions, share and share alike, and to be paid and divided amongst them accordingly. And he appointed his wife and the said J. S. Taylor and R. Edwards executrix and executors of the said will.

Edward Taylor died on the 24th May, 1849, without issue, in the lifetime of his father; and the question now brought before the Court was, to whom the one-seventh share bequeathed to him in the proceeds of the sale of the testator's real estate and in the personal estate was to go.

The plaintiffs in the suit, Jane C. E. Taylor and Mary Taylor, were the daughters and co-heiresses-at-law of the testator's eldest son William Taylor the younger, who died on the 21st November, 1848; and they claimed, as co-heiresses-at-law of the testator, to be entitled to the one-seventh share of the proceeds of the \* 192 real estate, alleging \* that it had lapsed for the benefit of the heir-at-law of the testator; and they claimed, as two of the next of kin of the testator, to be interested in one-sixth of two-thirds of one-seventh share of the personal estate.

The cause was set down before the Vice-Chancellor STUART, but his Honor considered that the question had been to a certain extent dealt with by the Lord Justice TURNER, when Vice-Chancellor, in the case of *Taylor's Settlement*, (a) arising out of the same will, and that therefore it was more fitting to be heard by the Lords Justices or by the Lord Chancellor. On the matter being mentioned to the Lords Justices, they considered that the reason which had induced the Vice-Chancellor to decline hearing it, made it more proper to be taken at once to the Lord Chancellor.

*Mr. Craig and Mr. W. D. Lewis*, for the plaintiffs.—They submitted that the authorities previous to *Phillips v. Phillips* (b) were clearly in favour of the right of the heir-at-law. *Digby v. Le-gard*, (c) *Ackroyd v. Smithson*, (d) *Mallabar v. Mallabar*, (e) *Durour v. Motteux*, (g) *Robinson v. Taylor*, (h) *Collins v. Wake-man*, (i) *Amphlett v. Parke*. (k) They contended that the decision of Sir J. LEACH in *Phillips v. Phillips* was wrong; that it had been disapproved of: *Cogan v. Stephens*, (l) *Williams v. Williams*; (m) or at all events had not been followed: *Gordon v. Atkin-* \* 193 *son*, (n) *Flint v. Warren*, (o) \* *Fitch v. Weber*, (p) *Shall-* *cross v. Wright*; (q) and that it ought now to be reversed. They also referred to the cases of *Countess of Bristol v. Hunger-* *ford*, (r) *Jessopp v. Watson*, (s) *Christian v. Foster*. (t)

(a) 9 Hare, 596.

(g) 1 Ves. 320, and 1 S. & S. 292, n.

(b) 1 M. & K. 649.

(h) 2 Bro. C. C. 589.

(c) 3 P. W. 22, n.

(i) 2 Ves. Jr. 683.

(d) 1 Bro. C. C. 503.

(k) 2 Russ. & M. 221.

(e) Ca. temp. Talb. 78.

(l) 5 Law J. Ch. 17; Lewin on Trustees, App. 698.

(m) 5 Law J. Ch. 84.

(p) 6 Hare, 145.

(s) 1 M. & K. 665.

(n) 1 De G. & S. 478.

(q) 12 Beav. 505.

(t) 2 Phil. 161.

(o) 16 Sim. 124.

(r) 2 Vern. 645.

The *Solicitor-General*, *Mr. Malins*, and *Mr. Briggs*, for the defendants, the executors, and next of kin. — The case must be tried by general principles. If a testator desires a particular thing to be done for the purposes only of the will he is making and the directions he is giving, it is agreed that if those directions fail, the thing desired to be done will no longer form part of the will: the cases cited on the other side fall within the scope of this admitted proposition. A different doctrine, however, applies if a man directs his property to be sold, and the proceeds to be given among a number of persons, and then one of those persons dies; in such a case the property has, under the direction given, obtained a certain quality, and the survivors of the class, or the next of kin, or whoever it may be, come and take the share of the deceased party just as he would himself have done if alive. The failure of a part of the distribution does not do away with the necessity for creating the fund to be distributed, and the party who takes in default takes only what the original donee would have taken. [They commented on the various cases quoted on the other side, and submitted that they bore out the above proposition, and mentioned in addition *Ashby v. Palmer*. (a)]

*Mr. Craig* replied, contending that *Ackroyd v. Smithson* (b) \* was an answer to the argument of the defendants. \* 194

THE LORD CHANCELLOR. — This is the case of a claim filed by the two daughters of William Taylor, who was one of several children of William Taylor the testator in the cause. The testator by his will devised, &c. [His Lordship here stated the will as above set out.] And the allegation on the part of the plaintiffs is, that Edward Taylor having died in the testator's lifetime, the one-seventh bequeathed to him of the proceeds to arise by the sale of the testator's real estate has devolved on them as co-heiresses of the testator; they also claim to be interested as next of kin in the one-seventh of the personal estate, which also lapsed.

The question is, whether the seventh share of the money produced by the sale of the real estate is in consequence of the death of E. Taylor to go to them as undisposed-of real estate, or is to go as undisposed-of residue of personal estate to the next of kin.

(a) 1 Mer. 296.

(b) 1 Bro. C. C. 508.



There could be no doubt on this but for the case of *Phillips v. Phillips*, (a) all the authorities except that case being in harmony. In *Mallabar v. Mallabar*, (b) *Durour v. Motteux*, (c) *Green v. Jackson*, (d) and *Ashby v. Palmer*, (e) the Court was dealing with the question whether lapsed portions did or did not pass under a gift of residue; and whether they are all in conformity the one with the other is immaterial, because in each of them the sole question was, what was meant to pass by the term "residue."

Those cases have therefore no application to the present, \*195 where the \*question is not what the testator meant by residue, but what is to become of property as to which there is no gift, the disposition having in fact become ineffectual.

Putting out of consideration the distinction which has been taken between the present and some of the earlier cases, that there is here a direction that the money to arise by the sale of the real estate should be part of the personal estate, the rule is established by the case of *Digby v. Legard* (g) and *Ackroyd v. Smithson*, (h) that if a testator disposes of his property, realty and personalty, as a mixed fund, and as to part of it his will cannot take effect, the heir-at-law will take so much as was the produce of real estate, upon the principle that the heir-at-law cannot be disinherited without express words. The cases just mentioned, as also *Cruse v. Barley*, (i) lay down this, which may be therefore taken as the cardinal rule. *Ackroyd v. Smithson* was followed by Lord THURLOW in *Robinson v. Taylor*; (k) and in *Collins v. Wakeman*, (l) Lord LOUGHBOROUGH said, "Where the Court has no direction from the testator to whom the money arising from any part of his real estate shall go, it rests with his heir-at-law."

Omitting various intermediate cases, where the question was what should be considered to pass by a gift of residue, and which therefore do not apply, we come to the case of *Phillips v. Phillips*, (a) before Sir JOHN LEACH. There the testator devised his freehold and copyhold estates to his executors, upon trust for sale, and then declared his will to be, that the moneys which should

(a) 1 M. & K. 649.

(b) Ca. temp. Talb. 78.

(c) 1 Ves. 320.

(d) 5 Russ. 35.

(e) 1 Mer. 296.

(g) 3 P. W. 22, n.

(h) 1 Bro. C. C. 503.

(i) 3 P. W. 20.

(k) 2 Bro. C. C. 589.

(l) 2 Ves. Jr. 683; see p. 687.

arise from the sale of his freehold and copyhold estates, should be deemed to be part of his personal estate, and that the rents and profits of his freehold and copyhold estates \* 196 until sale should from and immediately after his decease be deemed part of the annual income of his personal estate, and should be subject to the dispositions thereafter to be made concerning his personal estate and the income thereof; and touching the produce of his freehold and copyhold estates, and his goods, chattels, stock in trade, debts, and all other his personal estate whatsoever, he directed that his executors should convert the whole into money, and pay thereout all his debts, funeral expenses, and legacies, and the rest, residue, and remainder of the produce, of his freehold and copyhold estates when converted into money he gave in equal shares to five persons named. One of these residuary legatees died in the lifetime of the testator, and his fifth share consequently lapsed. His Honor held that the next of kin excluded the heir from sharing in the residuary estate, the inference being that the testator intended to give the produce of the real estate the same quality as if it were personal estate at his death. I consider that case as now under appeal, for I am quite unable to distinguish it from the present, and the question is, whether it ought to guide me or not; and I must confess that if this were the day after it was decided, I should say that it did not harmonize with any principle to be derived from the former cases. The argument sought to be raised from the testator's declaration that the proceeds of the real estate should be deemed to be part of his personal estate seems to me of no weight. The decision in *Collins v. Wakeman* (a) is a clear authority against it: it is only a short mode of saying that the disposition of the personal estate is to be the guide for the disposition of the proceeds of the real estate; and it would be a strange construction to hold, that because a testator desires to disinherit his heir in favour of some person named, the right of the \* heir is to be defeated for the benefit of some person whom the testator has no design to favour. \* 197

If, then, the case of *Phillips v. Phillips* had come before me on appeal the day after it was decided by Sir J. LEACH, I should have felt it my duty to overrule it; and if such would have been my

duty then, what course ought I to take now? Every branch of the Court has in some way or other expressed an opinion upon that decision. What Lord COTTENHAM thought of it is quite clear, though he was not in *Cogan v. Stephens* (a) called upon to over-rule it; *Gordon v. Atkinson*, (b) before the Lord Justice KNIGHT BRUCE, when Vice-Chancellor, was wrongly decided if *Phillips v. Phillips* is right; in *Fitch v. Weber* (c) there was a declaration that the proceeds arising from the sale of the real estate should not in any event lapse to the heir, but the Court held that the heir was disinherited for the purposes of the will only, and therefore took the proceeds of the real estate undisposed of by the will; and in *Shallcross v. Wright* (d) and *Flint v. Warren* (e) a similar course was followed.

The law gives the estate to the heir, notwithstanding the direction of the testator, unless the testator makes a valid devise of it otherwise. Of course I do not mean to say that a testator might not so dispose of the proceeds of real estate as to make it go to the next of kin; for example, he might, after directing the sale of his real estate and forming a mixed fund and making certain dispositions of it, declare that if for any reason any part of the disposition could not take effect, no portion of the proceeds arising from the sale of the real estate should go to his heir-at-law, but should go to such persons as would have been entitled if the estate \* 198 had been sold by him in his lifetime. \* In that case the next of kin would take, because there would be an express gift to them by the testator, but not as an interpretation of words of direction such as we have here.<sup>1</sup> My opinion, therefore, is in favour of the plaintiffs; and the decree will be accordingly, that the share of E. Taylor in the produce of the real estate of the testator is to be deemed real estate, and is undisposed of by the will, and that it goes to the plaintiffs as co-heiresses of the testator.

(a) 5 Law J. Ch. 17.

(d) 12 Beav. 505.

(b) 1 De G. & S. 478.

(e) 16 Sim. 124.

(c) 6 Hare, 145.

<sup>1</sup> See *Craig v. Leslie*, 3 Wheat. 564; *Burr v. Sim*, 1 Whart. 252; *Morrow v. Brenizer*, 2 Rawle, 185; *Arnold v. Gilbert*, 5 Barb. 192; *Wright v. Methodist Episcopal Church*, 1 Hoff. 205.

In the Matter of WILLIAM WEST and JOHN WEST,  
Bankrupts.

1853. June 11. Before the Lord Chancellor Lord CRANWORTH.

A petition to annul an adjudication in bankruptcy on the ground of the infancy of the bankrupt, but which was not presented until after the expiration of the time limited for that purpose by the 233d section of the Bankrupt Law Consolidation Act, 1849 (12 & 13 Vict. c. 106), dismissed as out of time, the Lord Chancellor holding that the case of an infant was no exception from the provisions of that section.

THIS was an original petition presented by John West, one of the bankrupts, on the 2d June, 1853, praying that the adjudication of bankruptcy against him might be annulled, as being absolutely void by reason of his minority. The petition came on before the Lords Justices, but was heard by the Lord Chancellor at the request of their Lordships.

The petition stated that J. West, in the year 1853, carried on business jointly with W. West as linen-draper and grocer at Donington, in the county of Lincoln; that, on the 5th March, 1853, J. West and W. West were declared and adjudicated bankrupts on a petition filed against them for that purpose; that J. West surrendered and submitted to be examined, but had not passed his final examination: that J. West was an infant of the age of nineteen years and eight months, having been born on the 28th September, 1833; that J. West never represented himself to any person whomsoever to be of full age or \* twenty- \* 199 one years old, nor stated on any occasion whatever that he was so old; that J. West was not aware, until the 17th April, 1853, that any doubt existed as to the validity of the adjudication.

It appeared in the evidence, though not stated in the petition, that the bankruptcy was advertised in the London Gazette on the 11th March, 1853, upon consent given by the bankrupts; also that, on the 27th April, 1853, J. West presented a petition for the same purpose as the present to the Chief Commissioner of the Court of Bankruptcy, which, coming on to be heard on the 2d May, 1853, before Mr. Commissioner HOLROYD, was dismissed on the authority, as was stated at the bar, of the case of *Ex parte Carter*

before the House of Lords ; (a) but no petition of appeal was presented against that decision.

*Mr. Russell*, with whom was *Mr. Lucas*, in opposition to the petition, stated two preliminary objections : first, that the petitioner ought to have appealed within fourteen days from the decision of the commissioner, and that, not having done so, he was now too late ; and, secondly, that, being in England and having taken no steps to dispute the adjudication, he was now precluded from disputing it, under the 233d section of the Act 12 & 13 Vict. c. 106.

*Mr. Lovell* appeared for the petitioner. — He insisted that the provisions contained in the Act referred to, limiting the right of disputing the adjudication, could not apply to the case of an infant : he cited, on the question of lapse of time since the advertisement, *Ex parte Phipps*, (b) and observed that an infant \* 200 could \* not give the consent to the adjudication being advertised under the 104th section of the Act. He contended also, on the main question in the case, that an infant could not be a bankrupt, relying on *Belton v. Hodges* (c) which refers to *Ex parte Moule* (d) and *Ex parte Watson*, (e) *Ex parte Adam*, (g) *Ex parte Henderson*, (h) *O'Brien v. Currie*, (i) *Thornton v. Illingworth* ; (k) and that the only case in which the Court refused to supersede a commission on the ground of infancy was, where there had been fraud on the part of the infant by his representing himself to be of full age.

*Mr. Russell* and *Mr. Lucas*, for the assignees. — They relied on the objections already stated, contending that the bankrupt, although an infant, was bound by the proceedings, having surrendered and taken the benefit of them. *Goldie v. Gunston*, (l) *Prideaux v. Webber*, (m) *Ex parte Watson*. (e)

*Mr. Allnutt* appeared for W. West, the other bankrupt.

*Mr. Lovell* replied.

(a) 17 Jur. 515.

(b) 3 Mont. Dea. & De G. 488.

(c) 9 Bing. 365.

(d) 14 Ves. 602.

(e) 16 Ves. 265.

(g) 1 V. & B. 493, 494.

(h) 4 Ves. 163.

(i) 3 Car. & P. 283.

(k) 2 B. & C. 824.

(l) 4 Camp. 381.

(m) 1 Levinz, 31.

THE LORD CHANCELLOR. — In deciding that this petition cannot be maintained, it may be stated as a general rule in legislation as to statutes passed for the purpose of limitation, that all parties are bound but for exceptions expressly contained in them ; otherwise there would be no use in making those exceptions at all ; and it may be, therefore, inferred that \* where there \* 201 is a statutory limitation introduced by the legislature, unaccompanied by an exception, no exception is intended. I cannot, then, introduce any exception into the Act in question. I do not know whether it may not have been expressly intended that no exception should exist ; it may have been thought better to close the door at once against all further dispute ; but I do not go on this, for all that I have to do is to follow the language of the Act.

The two hundred and thirty-third section provides that, if the bankrupt, being within the United Kingdom, shall not within twenty-one days after the advertisement, commence a proceeding to dispute or annul the adjudication, then the Gazette containing the advertisement shall be conclusive evidence against the bankrupt ; and no exception is made. This gentleman did not present his petition within the twenty-one days ; and I think that he is now bound by the proceedings. If he is not bound now, he would not be so fifty years hence ; and though there may be evils attendant on including such a person as the petitioner within the provisions of the Act, there would possibly be just as many in holding him to be excepted. My opinion is, that the petition is out of time, and must be dismissed. This will not preclude the bankrupt from establishing at law the invalidity of the adjudication. The costs of the assignees and of the other bankrupt will be paid out of the estate.

July 23.

His Lordship, on the application of *Mr. Lovell*, and under the 18th section of the Bankrupt Law Consolidation Act, 1849, gave leave to the petitioner to file a special case in order to bring the matter by appeal before the House of Lords.

1853. February 10. June 25. July 9, 16. Before the Lord Chancellor Lord CRANWORTH, assisted by Mr. Baron PARKE and Mr. Justice CRESSWELL.

S. and J. being joint tenants of copyhold lands for life in remainder expectant upon the determination of a previous life-estate in M., with several inheritances in tail, with cross remainders in tail, S. and her husband, without the concurrence of M., surrendered their estate and interest to the intent that the lord should regrant the same to such person or persons as the husband should by will appoint: S. died in the lifetime of her husband and of J.; the husband afterwards died, having by his will appointed the surrendered share to his executors; *Held*, that the *quasi* estate tail of S. was not barred, and that whether the life-estate of M. was under the same instrument as that under which S. and J. derived their title, or whether M.'s tenancy was under her paramount title of freebench, still her concurrence was necessary in order effectually to bar the estate tail in remainder.

*Held*, also, that there was, under the circumstances, no severance of the joint tenancy.

Whether the surrender by a joint tenant to the use of his will would *per se* effect a severance of the joint tenancy, *quære*.

THIS was an appeal by the plaintiffs, George Edwards and Sarah his wife, from the decree of the Vice-Chancellor KNIGHT BRUCE, made on the hearing of this cause on the 2d February, 1847.

Soon after that decision, an appeal was presented by the plaintiffs to the Lord Chancellor (Lord COTTENHAM), who upon that occasion directed a case to be stated for the opinion of a Court of Law. The case, as prepared for that purpose, was not stated with sufficient precision to enable the Court of Common Pleas to adjudicate upon it. The plaintiffs afterwards applied to the Vice-Chancellor PARKER to have the case amended, but he in substance refused that application: it was then renewed before the Lord Chancellor, and the Act 15 & 16 Vict. c. 86, having in the mean time passed, by the 61st section of which the power of directing a case for the opinion of a Court of Law is taken away from the Court of Chancery, his Lordship was of opinion that under the circumstances, the plaintiffs were entitled to have the matter reheard before him, as an appeal from the decree of the Vice-Chancellor, and as if it had been omitted to be heard before the

Lord Chancellor (Lord COTTENHAM); and that the justice  
\* 203 of the case would be met by his requesting \* the attendance

of two of the common-law judges to sit along with him in the adjudication of the question.

The appeal accordingly came on to be heard on the 25th June, 1853, before his Lordship, assisted by Mr. Baron PARKE and Mr. Justice CRESSWELL. The facts are here restated from the report of the case in the first volume of Messrs. De Gex and Smale's Reports, page 75 ; but it will be observed that the main question argued and determined on the present appeal was not adverted to either in the argument or the judgment of the Court below.

In May, 1797, an estate called Acridges, which had been holden for lives of the lords of the manor of Bleadon-with-Priddie in the county of Somerset, was on the nomination of George Yeo, the then proprietor, granted in reversion to Ann Bailey (then Ann Yeo) for the term of her life immediately after the death, surrender, or forfeiture of the said George Yeo, George Yeo his son, and Mary Yeo his daughter. The grant to Ann Bailey was made to her as a trustee only for George Yeo.

George Yeo the son and Mary Yeo the daughter having died, a fresh grant of the premises in reversion was made in May, 1807, on the nomination of George Yeo, the nominee in reversion in trust being his daughter, Sarah Yeo, and the previous nominees for lives being the said George Yeo, the said Ann Bailey, and Maria Thomas. At the same time George Yeo surrendered into the hands of the lords of the manor all his interest in the premises, to the intent that the lords might thereafter regrant the same to such person or persons, and for such life or lives as the surrenderor should by will give, devise, direct, limit, or appoint.

George Yeo, by his will dated the 11th January, \* 1815, \* 204 gave as follows: " I give, devise, and bequeath all that both estates late Deanes and Acridges in Bleadon aforesaid, unto my beloved wife Mary Yeo, as long as she shall remain a widow, and if my wife should happen to marry, then I give, devise, and bequeath the aforesaid premises unto my daughters, Jane Yeo and Sarah Yeo, and their heirs, and for want of such issue then to Nancy Bailey (meaning the before-named Ann Bailey) and her heirs for ever, and my wife to keep the same full stated, and in case my wife should happen to marry and lost the estates to my daughters, then they shall pay her 20*l.* a year at half-yearly payments during her life:" the testator then, after making certain other devises and giving various pecuniary legacies, proceeded



thus: " All the rest, residue, and remainder of my household goods, estates, chattels, moneys, and securities for moneys, I give, devise, and bequeath unto Sarah Yeo and Jane Yeo, their heirs, executors, administrators, and assigns;" and he appointed them executrixes of his will.

The testator died in 1818 without revoking his will, which was proved by the executrixes. He left his widow Mary Yeo, and also Ann Bailey and his daughters Sarah Yeo and Jane Yeo, surviving him.

After the testator's death, and in 1818, Mary Yeo the widow, not accepting the devise to herself for life or widowhood, was admitted tenant in dower or freebench of Acridges for her widowhood, according to the custom of the manor, under her title paramount to the devise. She entered into possession of the property; and, not marrying again, received the rents down to the time of her death, which took place in 1844.

Sarah Yeo married George Edwards; and in 1820  
 \* 205 \* Acridges was granted to George Edwards and Jane Yeo at their nomination in trust for their own sole use and benefit for the term of their natural lives, and the life of the longest liver of them successively, at the will of the lords immediately after the death, surrender, or forfeiture of Ann Bailey and Sarah Edwards; and thereupon Ann Bailey was admitted tenant in trust for George Edwards and Jane Yeo.

Jane Yeo afterwards married William Champion; and in 1831 she and her husband, but without the concurrence of her mother, surrendered their estate and interest in Acridges to the intent that the lords of the manor might at any time thereafter regrant the same to such person or persons for the same or such further or other life or lives as William Champion, in and by his last will and testament in writing already made and duly executed or which he might at any time thereafter make and duly execute, should give, devise, direct, limit, or appoint the same.

Jane Champion died, leaving Sarah Edwards, her sister, surviving her.

In 1844, after the death of the widow, an action of ejectment was brought for one moiety of Acridges on the joint demise of William Champion and Ann Bailey.

The bill filed by George Edwards and Sarah his wife against William Champion and Ann Bailey, after suggesting a breach of

trust on the part of Ann Bailey in allowing her name to be used in the action of ejectment, prayed that it might be declared that the devise to Sarah Edwards and Jane Champion of Acridges, was a devise to them as joint tenants; and that by the death of Jane Champion the entire equitable estate in remainder after the death of Mary Yeo the widow vested \* in the plaintiffs in \* 206 right of Sarah Edwards; that Ann Bailey might be decreed to assign the property to the plaintiffs; and for an injunction, &c.

W. Champion, by his answer, submitted that by the surrender of 1831, the joint tenancy created by the will of the testator was severed, and consequently that upon the death of the widow, the entirety of Acridges did not vest in the plaintiffs, but that one moiety devolved to the defendant by reason of his marriage with Jane Yeo.

Upon the death of W. Champion, a bill of revivor and supplement was filed against his executors, to whom he had devised all his copyhold estates upon certain trusts.

When the cause was heard before the Vice-Chancellor KNIGHT BRUCE, his Honor decided, upon the arguments then addressed to the Court, that the joint tenancy had been well and effectually severed by the surrender of 1831. (a)

The main question argued on the present occasion was, whether the *quasi* estate tail in remainder claimed by George Edwards and Sarah his wife in her right in the entirety of the premises called Acridges, was or not, as to one moiety, barred by the surrender of W. Champion and Jane his wife in 1831, for want of the concurrence of the first tenant for life, Mary Yeo the widow of the testator George Yeo.

*Mr. Lee* and *Mr. W. D. Lewis*, for the plaintiffs, in support of the appeal. — The subject-matter of the devise being permanent, fixed, and immovable, it is beyond all doubt real estate: 2 Bl. Com. p. 16; and being descendible copyholds, \* the \* 207 question must be construed by analogy to the rule of law as applicable to descendible freeholds. We submit that the daughters took as joint tenants for lives, with several inheritances in tail with cross remainders between them in tail; and the reason, according to Litt. § 283, “ why they shall have several inheritances

(a) 1 De G. & S. 75.

is this, inasmuch as they cannot by any possibility have an heir between them ingendred, as a man and a woman may have, &c., the law will that their estate and inheritance be such as is reasonable," &c. The remainders were not contingent, but vested. *Luxford v. Cheeke*, (a) Fearné Cont. Rem. 239. No act has been done to bar the entail or to sever the joint tenancy, with the exception of the surrender by Jane Champion during the life of the tenant for life, but without her concurrence. Under these circumstances it is clear, that upon the death of Jane Champion there were no uses which could take effect, and no estate which could interfere with the limitations of George Yeo's will: Sarah Edwards, therefore, was, upon the death of her sister Jane Champion, and of her mother the tenant for life, entitled by survivorship to the entirety of the premises in question. There is no express authority for this position with respect to copyholds; but in the case of *Wastneys v. Chappell*, (b) it was held that a limitation of leaseholds for lives to A. for life, and then to B. and C., and after the death of either B. or C. without heirs of their bodies to D., was good, and that an attempted alienation by B. in the lifetime of A., without the concurrence of A., did not operate to bar the remainder to D. Upon the same principle the Lords Commissioners decided the case of *Slade v. Pattison*. (c) Lord ST. LEONARDS also in \* 208 the case of *Allen v. Allen*, (d) \* referring to the necessity of a *quasi* tenant in tail obtaining the concurrence of the tenant for life, makes the following observation: "That was my opinion when at the bar, not upon any strained analogy to the technical rule which required that there should be a tenant to the *præcipe* in order to defeat subsequent remainders in the case of estates tail in lands of inheritance, but upon this plain ground; namely, the solid advantage secured by the check which is thus given to a tenant for life over those in remainder, and which every parent ought to possess over any alienation by *quasi* tenants in tail before they come into the possession of the estate, thus following the analogy to fee-simple estates as far as it was beneficial." Before the statute of frauds it was thought that descendible freeholds were not devisable, and by the 12th section of that statute such estates are expressly made devisable, but, it is to be observed, with all the formalities required for the devisé of real estate. It is true

(a) 3 Levinz, 125.

(c) 14 Law J. Ch. 51.

(b) 3 Bro. P. C. 50.

(d) 2 Dru. & War. 307; see p. 332.

that by the Act 14 Geo. 2, c. 20, § 9, it is enacted that if there shall be no special occupant or devisee of an estate *pur autre vie* it shall go and be applied as personal estate, but *nullum simile est idem*, and if it were not realty, there would have been no necessity for a legislative declaration on the subject; besides, that section does not apply to estates *pur autre vie* where neither heir nor executor are named. *Zouch v. Forsee.* (a) An estate in land limited to a man and his executors is nevertheless freehold: *Oldham v. Pickering*; (b) and an estate *pur autre vie* limited to a man and his assigns was held not distributable, because "though it was assets, yet it remained freehold." *Ripley v. Waterworth*, (c) *Fitzroy v. Howard.* (d)

\* We further submit that the surrender was no severance \* 209 of the joint tenancy, and that the title of Sarah Edwards by survivorship accrued *eo instanti* on the death of Jane Champion, and that the surrender at best was only a surrender *in posse*, and as such unavailing to bar the remainder over. (e)

It was contended in the Court below, on the authority of Lord COKE, that one joint tenant might surrender to the use of his will: Co. Litt. 59 b; and that such surrender would enure as a severance of the jointure, but admitting that it could under any circumstances be effectual, it could only be so according to the doctrine of relation;

(a) 7 East, 186.

(b) 2 Salk. 464; S. C., Lord Raym. 96.

(c) 7 Ves. 425.

(d) 3 Russ. 225.

(e) Litt. § 286: "Also if two joyntenants be seised of an estate in fee-simple, and the one grants a rent charge by his deed to another out of that which belongeth to him, in this case during the life of the grantor the rent charge is effectual; but after his decease the grant of the rent charge is void, as to charge the land, for he which hath the land by survivor shal hold the whole land discharged. And the cause is, for that he which surviveth claimeth and hath the land by the survivor, and hath not, nor can claime any thing by descent from his companion," &c.

§ 287: "Also, if there bee two joyntenants of land in fee-simple within a borough, where lands and tenements are devisable by testament, and if the one of the said two joyntenants deviseth that which to him belongeth by his testament, &c., and dieth, this devise is void. And the cause is, for that no devise can take effect till after the death of the devisor, and by his death all the land presently commeth by the law to his companion, which surviveth, by the survivor; the which hee doth not claime, nor hath any thing in the land by the devisor, but in his owne right by the survivor according to the course of law, &c., and for this cause such devise is void."

that, however, could not operate to the prejudice of the rights of a third party, and being a collateral act there can be no relation. *Butler and Baker's Case.* (a) It is to be noted that the ability to devise by surrender is with reference to a transaction between the lord and his tenant; in the present instance, however, the case is not that of a surrender to the use of a tenant's will, but to the use of the will of a stranger not connected in seigniorship with the lord.

In *Flack v. The Master, Fellows, and Scholars of Downing College*, (b) which is the latest authority bearing on the point, there being a surrender to such uses as a vendor might direct, the Court held that the lord was not bound to accept such surrender. The cases of *Boddington v. Abernethy*, (c) *The King v. The Lord of the Manor of Oundle*, (d) and *Glass v. Richardson*, (e) which are opposed to the *Downing College Case*, cannot be sustained.

*Mr. Malins and Mr. H. Prendergast*, for the defendants, in support of the Vice-Chancellor's decision.—Admitting that these copyholds for lives are real estate, and admitting that in analogy to the rule of law as applicable to the barring of estates tail in freeholds, quasi tenants in tail of copyholds for lives, must obtain the concurrence of the owner of the previous life-estate, in order effectually to bar the remainders over, we submit that such analogy does not apply under the particular circumstances of this case, for here the widow did not take under the same instrument as the daughters. The widow being, according to the custom of the manor, entitled to her freebench in the whole of her husband's estates, her title by way of freebench was paramount to the conditional devise under her husband's will. "The estate in freebench is regarded as an excrescence growing out of that of the husband." And being as it were a continuance of his estate (2 Wat. Cop. p. 99; Gilb. Ten. pp. 26, 27), that estate is said to be "big with the estate of the wife." *Rennington v. Cole.* (g) The devise therefore to Sarah and Jane Yeo must be construed as immediate, and their estate, in effect, a joint tenancy, with separate remainders in tail, for by the operation of the surrender the

(a) 3 Rep. 25 a.

(b) 17 Jur. 697.

(c) 5 B. & C. 776.

(d) 1 A. & E. 283.

(e) 9 Hare, 698.

(g) Noy, 29.

joint tenancy was severed. *Vaughan v. Atkins*. (a) The title of the daughters under the will not being under the same instrument as the paramount title under which their mother took, the strict principle of feudal law did not apply. *Rowe v. Power*. (b) Importing the analogy from the existing statutory provision, 3 & 4 Will. 4, c. 74, § 22, the protector of a settlement must be a person taking under the same instrument as the estate tail which it is sought to bar, and, by the 27th section, no woman in respect of her dower is to be the protector of a settlement.

Littleton, § 283, in putting the case of lands being "given to two men, &c.," was speaking of gifts not under a will, but by deed; in the latter the principle of construction is most strongly to operate against the grantor, but in wills the construction is to be most in favour of the heir-at-law.

We further submit that the surrender itself, being a severance of the joint tenancy, operated not from the date of the husband's will, but from the date of the surrender. The case of *Flack v. The Master, Fellows, and Scholars of Downing College* is distinguishable, and does not controvert the doctrine that springing uses may attach to copyholds, nor was it intended by that decision to affect the authority of the cases of *Boddington v. Abernethy*, (c) and *The King v. The Lord of the Manor of Oundle*. (d)

[\* Mr. Justice CRESSWELL acquiesced in that view of the \* 212 decision.]

It is clear, however, that a joint tenant may surrender to the use of his will, and that such surrender will effect a severance (Co. Litt. 596); and even a dormant surrender will operate as a severance of a joint tenancy. *Gale v. Gale*. (e)

*Mr. Lee*, in reply. — The defendants have conceded that the premises in question were not personalty. The analogy between barring estates tail in copyholds for lives and freeholds was also conceded; but it was said, that the life-estate in the present case not being under the same instrument, the analogy did not apply, and the new law under the statute of Will. 4 was brought in aid;

(a) 5 Burr. 2764.

(b) 2 New Rep. 1.

(c) 5 B. & C. 776.

(d) 1 A. & E. 283.

(e) 2 Cox, 136.

but this question is to be decided with reference to the state of law in 1831, the date of the surrender. It was then said that the estate of the widow was an excrescence or continuance of that of the husband; if so, the *quasi* freehold was even in that case vested in the widow, whose concurrence by the analogy would still be requisite.

The rule of construction referred to in Littleton, § 283, is not to be restricted to limitations by deed, but is equally applicable to limitations by will. *Cook v. Cook*. (a) With respect to the severance of the joint tenancy by the surrender, Chief Baron EYRE, in *Gale v. Gale*, (b) doubted whether a surrender to the use of a man's own will was a severance of the joint tenancy, the surrender being revocable.

At the conclusion of the argument, the learned Judges  
 \* 213 \* desired time to consider the questions which had been submitted to them; and on the 9th July, 1853, Mr. Baron PARKE, on behalf of Mr. Justice CRESSWELL and himself, delivered the following joint opinion:—

MY LORD CHANCELLOR,— Being called upon with my brother CRESSWELL to advise your Lordship in the case of *Edwards v. Champion*, on an appeal from a decree of the Vice-Chancellor (now Lord Justice) KNIGHT BRUCE, I consider that my duty is to give your Lordship the opinion of Mr. Justice CRESSWELL and myself, only upon those questions of law which have been debated in the argument before your Lordship in our presence.

The question arose as to the title of the appellants to a copyhold estate called Acridges, held for lives of the lords of the manor of Bleadon-with-Priddie in the county of Somerset, which had been granted in 1797, in reversion to Anne Bailey (then Yeo) as a trustee for her father George Yeo.

In 1807, a further grant for lives in reversion was made to George Yeo the son; and at the same time he surrendered to the use of his will.

He by his will, dated 11th January, 1815, devised Acridges to his wife so long as she remained his widow; and if she happened to marry, then he gave and devised the estate unto his daughters

(a) 2 Vern. 545.

(b) 2 Cox, 136.

Jane Yeo and Sarah Yeo and their heirs, and for want of such issue then to Anne Bailey and her heirs for ever ; and the testator's wife was to keep the same full stated (that is, to renew the lives) ; and if she happened to marry and lost the estate to his daughters, they were to pay her 20*l.* a year ; and \* there \* 214 was a devise of the residue to Sarah and Jane and their heirs.

The testator died in 1818. The wife was admitted afterwards to her freebench. Sarah married the plaintiff Edwards. Jane married the defendant Champion ; and in 1831, she and her husband (she being examined apart) surrendered Acridges to the use of any will of Champion's then made or thereafter to be made. She afterwards died in the lifetime of her sister, in 1844 ; but no will was then made. Champion died afterwards, having made a will in 1844, and a codicil in 1845.

The plaintiff Edwards, in right of his wife, claimed the whole by survivorship.

The first point made on the argument was, that these descendible copyholds were real estate, and analogous to descendible freeholds. This was conceded.

The next point was, that the devise to the daughters and their heirs, and if they died without issue, then to Anne Bailey and her heirs, made them joint tenants for life in remainder expectant on the death of the widow, with several *quasi* inheritances in tail and cross remainders in tail according to the rule in Litt. § 283, as to conveyances ; and *Cook v. Cook* (a) as to wills. And this we think admits of no doubt.

The third point was, that the *quasi* estate tail in remainder of Edwards and wife, in right of his wife, was not barred by the surrender of Champion and wife for want of the concurrence of the first tenant for life, the widow.

\* It was contended by *Mr. Lee*, for the appellants, that \* 215 there was an analogy between these *quasi* estates tail in copyholds for lives and proper estates tail, and that though *quasi* tenants in tail might bar their own issue by surrender, they could not bar estates in remainder without the consent of the person, who in a recovery would be tenant to the *præcipe* ; and for this the case of *Slate v. Pattison*, before the Lords Commissioners, (b)

(a) 2 Vern. 545.

(b) 14 Law J. Ch. 51.



was cited. And it was not disputed that the consent of the tenant for life was required, if there was one, in order to bar the remainder; but it was contended in this case that the widow had disclaimed her life interest under the will of her husband, and had been admitted, not to her life-estate under the will, but to her freebench by custom. But if this was so, the estate of freebench was a life-estate, the concurrence of whose tenant would be equally necessary, as it would have been if the estates had been freehold and a recovery suffered.

*Mr. Malins* contended that the consent was not necessary, because the tenant for life did not claim under the same instrument, and the necessity of concurrence depended upon the existence of an estate under the same will or settlement: this is all that is required under 3 & 4 Will. 4, c. 74, § 22. The owner of the prior estate under the same settlement is the protector of the settlement, and his consent is sufficient; but prior to that date the first tenant for life, whether under the same will or settlement or not, must have been tenant to the *præcipe* in a recovery; and by analogy, the consent of the widow would in the present case have been required to bar the estate tail in remainder.

We therefore think that the plaintiff *G. Edwards'* *quasi* estate tail in right of his wife has not been barred.

\* 216 \* Another question was made which is open to considerable doubts, whether, if the daughters had been simply joint tenants of the copyholds, the surrender of *Mrs. Champion* to the uses of the will of *Champion*, whose will was not made until after *Mrs. Champion's* death, when the plaintiffs' right of survivorship had accrued, severed the joint tenancy.

Upon this point it is probably unnecessary for us to give your Lordship any opinion, as the plaintiffs must succeed on the other. We will only say that there is no case in point; and we cannot feel satisfied that the mere surrender to the use of a will in the ordinary mode, no will having been made during the continuance of the joint tenancy, can operate to produce a severance.

July 16.

The Lord Chancellor, after stating the circumstances under which the question was brought before him, observed that he fully concurred in the opinion with which he had been furnished by the learned Judges who had assisted him in the case.

He then commented upon the several points made in the argument, in the order in which they are adverted to by Mr. Baron PARKE. With reference to the quality of the estate taken by the daughters, his Lordship in substance said: I am clearly of opinion that they took as joint tenants for life with several inheritances in tail with cross remainders in tail, for which position the 283d section of Littleton is a sufficient authority. The allegation on the part of the respondents, that Littleton was speaking of gifts by deed only, is met by the cases \* of *Cray v. Willis*, (a) *Aston v. Smallman*, (b) and *Wilkinson v. Spearman* cited in *Cook v. Cook*, (c) as having been decided on appeal to the House of Lords, in which case the same doctrine was finally established as applicable to wills; and *Fletcher's Case*, (d) was conclusive upon the point as to deeds. Such being the nature of the interest taken by the daughters, it is quite in accordance with the analogy to the rule applicable to the barring of estates tail in remainder in freeholds, that the *quasi* entail in the present case could not have been barred without the consent of the tenant for life. The analogy which was attempted to be introduced from the Statute 3 & 4 Will. 4, c. 74, cannot apply, as the commencement of the operation of that statute was long subsequent to the transaction now in question.

With regard to the effect of the surrender by Mrs. Champion to the use of her husband's will in severing the joint tenancy, I quite concur in the opinion which has been intimated by the learned Judges, that no severance was effected, for want of the concurrence of the testator's widow in the surrender of 1831. It is unnecessary for me to give any opinion upon the question whether a surrender by a joint tenant to the use of his will effects a severance; but I cannot understand on what principle or authority a surrender by a joint tenant to the use of the will of another, whose will does not come into operation until after the death of the surrenderor can be available for any purpose whatever.

The decree of the Vice-Chancellor must therefore be varied, as the plaintiffs have established their right to the entirety of the premises by survivorship.

(a) 2 P. W. 529.

(c) 2 Vern. 545.

(b) 2 Vern. 556.

(d) Ley, 47.

\* 218 \* In the Matter of RICHARD BULMER and JOSEPH BULMER, Bankrupts.

*Ex parte* JOHNSON.<sup>1</sup>

1853. February 26. March 16. May 7. Before the Lord Chancellor Lord CRANWORTH.

Messrs. B., ship-owners at South Shields, had dealings with K. & Co., bankers in London: the course of dealing was, that Messrs. B. drew bills on K. & Co. which K. & Co. accepted for the accommodation of Messrs. B., and in order to provide for the payment of these acceptances Messrs. B. remitted to K. & Co. cash and deposited with them bills payable to Messrs. B., and the amount of these bills was received by K. & Co. and placed by them to the credit of Messrs. B.'s cash account: both firms became bankrupt, K. & Co. in July, 1812, and Messrs. B. in August of the same year: there was then a large balance owing by Messrs. B. to K. & Co. on the cash account, K. & Co. being also liable to a large amount upon bills accepted by them for the accommodation of Messrs. B., and having in their hands bills, also to a large amount, deposited with them by Messrs. B. to provide for the payment of such acceptances; before any dividend was declared upon the estate of K. & Co., their assignees realized from the deposited bills more than sufficient to liquidate the cash balance due from Messrs. B.: the holders of the accommodation bills proved against both estates and were fully paid, receiving from each estate at different times dividends to the amount of ten shillings in the pound; the sum thus paid in dividends by the estate of K. & Co. exceeded by above 6000*l.* the total sum realized from the deposited bills; no debt was proved or attempted to be proved by the estate of K. & Co. against the estate of Messrs. B. until 1847, when a further portion of the outstanding estate of Messrs. B. was realized, but to an amount insufficient to complete a payment of twenty shillings in the pound to their creditors exclusively of K. & Co. *Held*, on a claim being made on behalf of the estate of K. & Co. for that purpose, that the assignees of K. & Co. were entitled to prove as a debt due from the estate of Messrs. B. the amount of the cash balance and also the 6000*l.*, and that in respect of the 6000*l.* and until thereby the same was repaid, they were entitled to the benefit as to any future dividends of the proofs made against the estate of Messrs. B. by the accommodation bill-holders. *Held* also, that the cash balance was not liquidated by the receipt of the larger sum from the deposited securities by the assignees of K. & Co. previously to the declaration of the first dividend, they being entitled under the circumstances of the case to appropriate the sum so received in the way they considered most beneficial to their estate; and that as to the right of the assignees of K. & Co. to stand in the place of the bill-holders, the case fell within the provisions of the Statute 49 Geo. 3, c. 121.

<sup>1</sup> S. C., 22 L. J. Bank. 65.

The general doctrine is, that a creditor holding a security is entitled to apply it in discharge of whatever liability of the bankrupt debtor he may think fit.<sup>1</sup>

Where two firms deal together, one making payments for and accepting bills for the accommodation of the other and receiving cash and bills from the accommodated firm by way of payment of and security for the outlay and liabilities made and incurred, the question how the proceeds of the bills so remitted are to be applied, must depend on the contract of the parties express or implied.

In a case where, in the absence of express contract, the course of dealing might have led to the presumption that the agreement between the parties was that the proceeds of each bill as it was paid should be applied as far as it would go in discharge of the cash balance, this presumption was not held to extend to the event of bankruptcy, or to establish any agreement which prevented the party who was in the position of a surety from insisting against the bankrupt principal on the same rights on which he might have insisted in the absence of contract.

THIS was an appeal in the form of a special case in bankruptcy, by the assignees of Messrs. Bulmer, from an order made on the 1st February, 1850, by the \* Vice-Chancellor KNIGHT \* 219 BRUCE, sitting in bankruptcy. The following statement of facts is taken from the special case.

Messrs. Kensington & Co. carried on business in London as bankers, and on the 22d July, 1812, became bankrupt: on the 6th August of the same year Messrs. Richard & Joseph Bulmer, who carried on business at South Shields as ship-owners and who had dealt with Messrs Kensington & Co. as their bankers in London, also became bankrupt.

In the course of the dealings between the two firms and in pursuance of an arrangement in that behalf, Messrs. Bulmer from time to time drew bills of exchange on Messrs. Kensington & Co. to a very large amount, which bills were accepted by Messrs. Kensington & Co. for the accommodation of Messrs. Bulmer. To enable Messrs. Kensington & Co. to take up and pay the said bills when at maturity or to reimburse themselves for what they paid on account thereof, Messrs. Bulmer from time to time remitted to Messrs. Kensington & Co. cash, and deposited with them bills of exchange payable to Messrs. Bulmer or their order and indorsed by them, which last-mentioned bills were held by Messrs. Kensing-

<sup>1</sup> As to the principle of appropriation of payments in cases of account generally, see 1 Story Eq. Jur. §§ 459 b-460, and notes and cases; Chitty Contr. (10th Am. ed.) 827 *et seq.*

ton & Co. until the same respectively arrived at maturity, when they received the amounts thereof; and according to the \* 220 course of dealing between the two \* firms, the said remittances of cash and the proceeds of such last-mentioned bills were, on the same being received respectively, from time to time placed to the credit of Messrs. Bulmer in their cash account with Messrs. Kensington & Co.

An account was kept between the two firms of all their dealings and transactions, and Messrs. Kensington & Co. from time to time forwarded to Messrs. Bulmer a statement of such account made up to the 30th June and the 31st December in each year, and such half-yearly statement of account was divided into two portions; in one of these (being the cash account) Messrs. Kensington & Co. debited themselves with the amount of all cash received by them and all matured bills paid to them on account of Messrs. Bulmer, and took credit for all payments made by Messrs. Kensington & Co. on account of Messrs. Bulmer, and upon such account a balance was struck; and in the other portion of the account a statement was made of all the bills deposited with Messrs. Kensington & Co. for the purposes aforesaid which had not arrived at maturity, and *per contra* a statement of all the bills accepted by Messrs. Kensington & Co. for the accommodation of Messrs. Bulmer then outstanding, but no balance was struck on such last-mentioned portion of the said account. The last of such cash and bill accounts was rendered on the 30th June, 1812.

At the time of the bankruptcy of Messrs. Kensington & Co. the sum of 7511*l.* 14*s.* 1*d.* was due to that firm from Messrs. Bulmer upon the cash account between them, and at the same time Messrs. Kensington & Co. were liable to a large amount upon bills accepted by them as aforesaid for or on account of Messrs. Bulmer which had not arrived at maturity, and Messrs. Kensington & Co. \* 221 held in their hands bills to a large amount deposited \* with them by Messrs. Bulmer for or towards enabling Messrs. Kensington & Co. to provide for the payment of such acceptances.

Between the 22d July, 1812, and the 6th August, 1812 (the date of the bankruptcy of Messrs. Bulmer), the assignees of Messrs. Kensington & Co. received, on account of Messrs. Bulmer, divers sums amounting together to 5016*l.* 11*s.* 1*d.*, thereby reducing the cash balance due from Messrs. Bulmer at the date of their bankruptcy to 2495*l.* 3*s.*

Among the bills which Messrs. Kensington & Co. had before their bankruptcy accepted for the accommodation of Messrs. Bulmer, were four bills for several sums amounting together to 3921*l.* 1*s.* 7*d.*, which at the bankruptcy of Messrs. Kensington & Co. were held by debtors of that firm, and which arrived at maturity in August and September, 1812, and which were, under the proceedings in the bankruptcy, allowed in full on account, by way of set-off to such debtors. The amount of the accommodation bills accepted as aforesaid, which were immatured at the bankruptcy of Messrs. Kensington & Co., but arrived at maturity before the 5th September, 1812, was 60,900*l.*

Between the 6th August, 1812, the date of the bankruptcy of Messrs. Bulmer, and the 25th December, 1812, the assignees of Messrs. Kensington & Co. received or realized, from bills remitted to or deposited with Messrs. Kensington & Co. prior to their bankruptcy by Messrs. Bulmer, sums amounting together to 5215*l.* 14*s.* 6*d.*, the first of which sums was received on the 5th September, 1812. Between the 25th December, 1812, and the 30th June, 1813, the assignees of Messrs. Kensington & Co. had further received or realized, from bills deposited with them prior to their bankruptcy by Messrs. \* Bulmer, sums amount- \* 222 ing together to the further sum of 3267*l.* 17*s.*, which made, with the aforesaid sum of 5215*l.* 14*s.* 6*d.*, the total sum of 8483*l.* 11*s.* 6*d.* The result of this was, that if the sum of 8483*l.* 11*s.* 6*d.* had been placed to the credit of Messrs. Bulmer in the cash account between the two firms, and Messrs. Bulmer had been debited in such account with the said sum of 3921*l.* 1*s.* 7*d.*, such account would on the 29th June, 1813, have shown a cash balance greatly in favour of Messrs. Bulmer.

The holders of the bills accepted by Messrs. Kensington & Co. for the accommodation of Messrs. Bulmer, and which were outstanding at the time of their bankruptcy (other than the holders of the said four bills paid by way of set-off), proved the bills held by them against both the estate of Messrs. Kensington & Co. and the estate of Messrs. Bulmer, and such bill-holders received in the years 1812 and 1813 two dividends of five shillings in the pound each out of the estate of Messrs. Bulmer upon such last-mentioned proofs.

On the 30th June, 1813, a dividend of six shillings in the pound was declared upon the estate of Messrs. Kensington & Co., and

thereupon the said bill-holders received in dividends upon their proofs against the estate of Messrs. Kensington & Co. 21,14*l.* 19*s.* 4*d.* At the time when such dividend was declared and paid, the assignees of Messrs. Kensington & Co. had realized from the securities which had been deposited by Messrs. Bulmer to or with Messrs. Kensington & Co. prior to their bankruptcy the said sum of 8483*l.* 11*s.* 6*d.* only. On the 27th November, 1813, a second dividend of one shilling in the pound was declared upon the estate of Messrs. Kensington & Co., and the said bill-holders received a further dividend of 3519*l.* 3*s.* 2*d.*, making with the former

\* 223 payments \* 24,634*l.* 2*s.* 6*d.* At the time when such second dividend was declared and paid, the assignees of Messrs. Kensington & Co. had realized from the said deposited securities the further sum of 2132*l.* 15*s.* 4*d.*, making in all 10,616*l.* 6*s.* 10*d.*

The assignees of Messrs. Kensington & Co., in 1814 and 1815, received from the assignees of Messrs. Bulmer, under circumstances not appearing, the proceeds of four bills of exchange, amounting together to 5000*l.*, and forming part of the estate of Messrs. Bulmer, and also the proceeds of several other bills, amounting in the aggregate to 3223*l.* 9*s.* 2*d.*, being part of the estate of Messrs. Bulmer. At that time it was expected by Messrs. Bulmer's assignees that the estate of Messrs. Bulmer would pay twenty shillings in the pound; and the assignees of Messrs. Kensington & Co. dealt with the proceeds thus received in exactly the same manner as with the proceeds of the deposited securities.

On the 29th August, 1815, a third dividend of three shillings in the pound (making with the former dividends ten shillings in the pound), was declared upon the estate of Messrs. Kensington & Co., and the said bill-holders received a further dividend of 10,557*l.*, making with the two former payments 35,191*l.* 12*s.* 2*d.* At the time when such third dividend was declared, the assignees of Messrs. Kensington & Co. had since the declaration of the second dividend received the sum of 10,361*l.* 16*s.* 8*d.*, in manner following: namely, from the said securities deposited before their bankruptcy, 3143*l.* 14*s.* 2*d.*; by the proceeds of the said four bills of exchange amounting to 5000*l.*, remitted to them as aforesaid, the said sum of 5000*l.*; and by the said other remittances made in 1815, 2218*l.* 2*s.* 6*d.* part of the said sum of 3223*l.* 9*s.* 2*d.*

\* 224 \* The total amount realized after the bankruptcy of Messrs. Bulmer by the assignees of Messrs. Kensington &

Co. from the securities deposited with that firm prior to their bankruptcy, and from the remittances received by the assignees in 1814 and 1815 from the assignees of Messrs. Bulmer, previous to the payment of the said sum of 35,191*l.* 12*s.* 2*d.* in dividends to the said bill-holders, was 20,979*l.* 3*s.* 6*d.*; and the assignees of Messrs. Kensington & Co. since the payment of the third dividend realized from the securities deposited with that firm prior to their bankruptcy, and from the residue of the said bills for 3223*l.* 9*s.* 2*d.*, further sums making, together with the said sum of 20,979*l.* 3*s.* 6*d.*, the sum of 26,300*l.* 13*s.* 8*d.*; and a further sum of 2117*l.* 14*s.* 2*d.* ought to have been received by them out of the proceeds of the securities deposited with them by Messrs. Bulmer.

If the sums of 26,300*l.* 13*s.* 8*d.* received, and 2117*l.* 14*s.* 2*d.* which ought to have been received, were deducted from the 35,191*l.* 12*s.* 2*d.* paid in dividends to the said bill-holders, there would remain a sum of 6773*l.* 4*s.* 4*d.* paid by the estate of Messrs. Kensington & Co. to the bill-holders over and above the value of the securities deposited or remitted by Messrs. Bulmer.

The said bill-holders received twenty shillings in the pound upon the amount of the bills, and the proofs made by them, amounting to 72,126*l.* 10*s.*, were still standing on the proceedings under the commission against Messrs. Bulmer.

In 1847, a sum of about 3000*l.* was realized out of the outstanding estate of Messrs. Bulmer, and became applicable to the payment of costs and of unsatisfied claims against their estate, but was insufficient for completing the payment of twenty shillings in the pound to \* their unpaid creditors, exclusively \* 225 of any claim on behalf of the estate of Messrs. Kensington & Co.

Exclusively of any claim on behalf of the estate of Messrs. Kensington & Co., two other persons claimed to prove debts amounting to 2240*l.* 16*s.* 8*d.* against the estate of Messrs. Bulmer, and the 3000*l.* was insufficient to pay to such persons and the persons entitled to receive dividends upon proofs already made, twenty shillings in the pound on the amount of their debts.

The assignees of Messrs. Kensington & Co. never proved or attempted to prove under the commission against Messrs. Bulmer any debt as due and owing from the estate of Messrs. Bulmer to the estate of Messrs. Kensington & Co. until the month of April,



1847; but it did not appear that any thing had taken place to render length of time important or material.

On the 19th April, 1847, Patrick Johnson, the official assignee of the estate of Messrs. Kensington & Co., applied by petition to Mr. Commissioner ELLISON at Newcastle, to prove under such commission as a debt due from the estate of Messrs. Bulmer to the estate of Messrs. Kensington & Co., a sum of 13,189*l.* 8*s.* 11*d.*, being the aggregate of the sums of 2495*l.* 3*s.* the cash balance due from Messrs. Bulmer to Messrs. Kensington & Co.; 8921*l.* 1*s.* 7*d.*, the amount of the four bills held by debtors of Messrs. Kensington & Co.; and 6778*l.* 4*s.* 4*d.*, the excess of payments to the said bill-holders above the amount realized by the bills as before stated; and claiming in the case of the last-mentioned sum to be entitled to stand in the place of the said bill-holders who had proved as to dividends and all other rights under the commission.

The commissioner, however, rejected the proof and claim, \* 226 because, as to the sums of 2495*l.* 3*s.* \* and 8921*l.* 1*s.* 7*d.*,

he was of opinion that those debts had been in fact extinguished by the receipt of a larger sum by the assignees of Messrs. Kensington & Co. between the 6th August, 1812, the date of the commission against Messrs. Bulmer, and the month of January, 1813, out of the proceeds of the negotiable securities remitted by Messrs. Bulmer, in the hands of Messrs. Kensington & Co., on the 6th August, 1812; and as to the sum of 6778*l.* 4*s.* 4*d.*, he was of opinion that the petitioner, as representing the estate of Messrs. Kensington & Co., was not a person who, at the issuing of the commission against Messrs. Bulmer, as surety, or liable for any debt of the bankrupts, had paid the debt or any part thereof in discharge of the whole, and that he was therefore neither entitled to stand in the place of the said bill-holders in respect of their proofs, or to prove the said demand as a debt under the commission, within the meaning of the statutes in that case made and provided.

In consequence of this decision, P. Johnson, on the 16th November, 1848, presented a petition to the Vice-Chancellor KNIGHT BRUCE, sitting in bankruptcy, praying that the petitioner might be at liberty to call a meeting under the commission against Messrs. Bulmer, in order that the petitioner might prove and establish his claims in respect of the said debts or sums of 2495*l.* 3*s.*, 8921*l.* 1*s.* 7*d.*, and 6778*l.* 4*s.* 4*d.*, and that as to the sum of 6778*l.* 4*s.* 4*d.*,

or such other sum as should appear to have been paid by the estate of Messrs. Kensington & Co. in dividends to the said bill-holders, the petitioner might be permitted to stand in the place of the said bill-holders as to the dividends and all other rights under the commission, and that the petitioner might prove and establish his claims accordingly ; or that the petitioner might be declared entitled to the benefit of the proofs made by the said bill-holders under the commission, and \* to receive dividends out of \* 227 the estate of Messrs. Bulmer to the extent of the said sum of 13,189*l.* 8*s.* 11*d.* or such other sum as should appear just, and that the assignees under the commission might be ordered to pay such dividends accordingly ; and that the costs of and incidental to the application might be paid out of the estate of the bankrupts.

This petition came on to be heard before the Vice-Chancellor, and his Honor made an order thereon dated the 1st February, 1850, declaring that the assignees of Messrs. Kensington & Co. were entitled to apply, and ought to be considered to have applied, the sum of 26,300*l.* 13*s.* 8*d.*, received by them as above mentioned, in or towards discharging or exonerating the estate of Messrs. Kensington & Co. from the acceptances they were under for Messrs. Bulmer at the time of issuing the commission of bankruptcy against Messrs. Bulmer : and therefore ordering that the petitioner should be at liberty to go in under the commission against Messrs. Bulmer, and tender and make such amount of proof as he might be able to establish in respect of the cash balance of 2495*l.* 3*s.*, and in respect of 3921*l.* 1*s.* 7*d.* or such other amount as he might be able to establish to have been paid in full by way of set-off in respect of the four bills of exchange before mentioned, and be admitted a creditor for what he should so prove, and be paid a dividend or dividends thereon until he should stand on an equality with the other creditors of the said bankrupts, and that the commissioner should receive and admit such proof accordingly, but without prejudice to any dividend or dividends which might have been already declared ; and further declaring that if any further dividend or dividends should be declared, the petitioner was entitled to the benefit of the proofs made by the said bill-holders, against Messrs. Bulmer, to the extent of the excess of the dividends paid \* under the commis- \* 228 sion issued against Messrs. Kensington & Co. to the said bill-holders over and above the sum of 26,300*l.* 13*s.* 8*d.* received, and the sum of 2117*l.* 14*s.* 2*d.* which might have been received by

the assignees of Messrs. Kensington & Co. as above mentioned; and ordering that the petitioner should be at liberty to go in before the commissioner and tender and make such amount of proof as he could establish in respect of such excess, and be paid any further dividends which might become payable upon such proofs made by the said bill-holders until such claim or demand should be satisfied, and that the commissioner should also receive and admit such proof accordingly.

The assignees of Messrs. Bulmer, being dissatisfied with this order, appealed to the Lord Chancellor. The questions raised by the special case were, first, whether, under the circumstances, the receipt by the assignees of Messrs. Kensington & Co. of the several sums amounting to 8483*l.* 11*s.* 6*d.* after the bankruptcy of Messrs. Bulmer and before the declaration of the first dividend on the estate of Messrs. Kensington & Co., operated in law as a satisfaction of the said sums of 2495*l.* 3*s.* and 3921*l.* 1*s.* 7*d.* which were due from the estate of Messrs. Bulmer to the estate of Messrs. Kensington & Co., or whether the assignees of Messrs. Kensington & Co. were entitled to retain the said sums amounting to 8483*l.* 11*s.* 6*d.*, for the purpose of the same being applied towards indemnifying the estate of Messrs. Kensington & Co. in respect of the dividends afterwards paid thereout to the said bill-holders; secondly, if the said sums of 2495*l.* 3*s.* and 3921*l.* 1*s.* 7*d.* were not satisfied in the manner mentioned in the first question, then, whether the receipt by the assignees of Messrs. Kensington & Co.

in the years 1814 and 1815 of the said sums amounting to \* 229 5000*l.* and 2218*l.* 2*s.* 6*d.* operated \* in law as a satisfaction of the said sums of 2495*l.* 3*s.* and 3921*l.* 1*s.* 7*d.*, or whether the assignees of Messrs. Kensington & Co. were entitled to apply the said sums amounting to 5000*l.* and 2218*l.* 2*s.* 6*d.* towards indemnifying the estate of Messrs. Kensington & Co. in respect of the dividends paid thereout to the said bill-holders; thirdly, whether the official assignee of Messrs. Kensington & Co. was entitled to any benefit of the proofs made by the said bill-holders against the estate of Messrs. Bulmer; and, fourthly, if the third question was answered in the affirmative, then whether the official assignee of Messrs. Kensington & Co. was entitled to receive all future dividends on the whole amount of the said proofs until the estate of Messrs. Kensington & Co. should be reimbursed what remained due to such estate in respect of the sum of 35,191*l.* 12*s.*

2*d.* (being the amount of the dividends paid out of such estate to the holders of the said accommodation bills), or whether such assignee was entitled to receive all future dividends on so much only of the said proofs as was equal to the said sum of 35,191*l.* 12*s.* 2*d.* until such estate should be reimbursed as aforesaid, or whether such assignee was entitled to receive all future dividends on so much only of the said proofs as was equal in amount to the sum remaining due to the estate of Messrs. Kensington & Co. in respect of the said sum of 35,191*l.* 12*s.* 2*d.* after applying in reduction thereof the proceeds of all securities and other receipts properly applicable to that purpose.

The case was fully argued before Lord TAUBO when Lord Chancellor, in December, 1851, but his Lordship had not delivered judgment at the time when he resigned the Great Seal. The parties having declined to accept his Lordship's judgment after his retirement, the appeal now came on to be reheard.

\* *Mr. Wigram* and *Mr. Goldsmid*, for the appellants. — \* 230  
As to the proof in respect of the cash balance of 2495*l.* 8*s.*, and the 3921*l.* 1*s.* 7*d.*, the amount of the four bills which came under the same head, they contended that these amounts must be considered as liquidated by the receipt by the assignees of Messrs. Kensington & Co. of the 8483*l.* 11*s.* 6*d.* previously to the 30th June, 1813; that the course of dealing between the firms showed that it was the duty of the assignees of Messrs. Kensington & Co. to apply the proceeds of each bill as received in diminution of the cash balance due by Messrs. Bulmer; that the cases of *Ex parte Hunter*, (a) *Ex parte Havard*, (b) *Ex parte Arkley*, (c) which had been relied on by the other side before the Vice-Chancellor, related to unrealized securities, and did not apply to the present case.

As to the right of the official assignee of Messrs. Kensington & Co. to the benefit of the proofs made by the bill-holders under the commission against Messrs. Bulmer, they contended that the case did not fall within the Statute 49 Geo. 3, c. 121, § 8, and that as to any supposed equity independent of the statute, none such

(a) 6 Ves. 94.

(b) Cooke's Bankrupt Laws, Vol. I., p. 120.

(c) Cooke's Bankrupt Laws, Vol. I., p. 122.

existed: *Ex parte Matthews*, (a) *Copis v. Middleton*, (b) this latter authority being opposed to *Ex parte Greenwood*, (c) relied upon by the other side; that at all events the assignee of Messrs. Kensington & Co. could only prove for the balance remaining due after realizing the securities. *Ex parte Brunskill*. (d) They also insisted that the estate of Messrs. Kensington & Co. must \* 231 account to the estate of Messrs. Bulmer for the \* bills remitted in 1814 and 1815, such remittance being under the circumstances a breach of trust. *Ex parte Bolton*, (e) *Fyler v. Fyler*, (g) *Armitage v. Baldwin*, (h) *The Attorney-General v. The Corporation of Leicester*, (i) *Priddy v. Rose*, (k) *Burridge v. Row*. (l)

The following cases were also mentioned: *Ex parte Marshal*, (m) *Ex parte Sammon*, (n) *Ex parte Soper*, (o) *Ex parte Rawson*, (p) *Smith v. Wigley*, (q) *Soutten v. Soutten*, (r) *Booth v. Booth*. (s)

*Mr. Russell* and *Mr. Pryor*, for the official assignee of Messrs. Kensington & Co., supported the order appealed from. — They contended that the assignees of Messrs. Kensington & Co. had a clear right to apply every security which they held in the manner most beneficial to themselves: *Ex parte Hunter*, (t) *Ex parte Waring*, (u) *Ex parte Havard*, and *Ex parte Arkley*; (v) that the distinction sought to be drawn between the present and the cases of *Ex parte Havard* and *Ex parte Arkley* was quite immaterial. They also insisted, that the surety being entitled to stand in the place of the creditor, the order was correct in giving to the estate of Messrs. Kensington & Co. the benefit of proofs made by the bill-holders: *Ex parte Greenwood*, (c) *Ex parte Brook*; (w) that *Copis v. Middleton* (b) did not touch the case.

(a) 6 Ves. 285.

(b) Turn. &amp; R. 224.

(c) Buck, 323.

(d) 4 Dea. &amp; Ch. 442.

(e) 1 Dea. &amp; Ch. 556.

(g) 3 Beav. 550.

(h) 5 Beav. 278.

(i) 7 Beav. 176.

(k) 3 Mer. 86.

(l) 1 Y. &amp; C. C. C. 183.

(v) Cooke's Bankrupt Laws, Vol I., pp. 120, 122; Christian on Bankrupt Law, Vol. II., pp. 404, 405.

(w) 2 Rose, 334.

(m) 1 Atk. 129.

(n) 1 Dea. &amp; Ch. 564.

(o) 4 Dea. &amp; Ch. 569.

(p) Jacob, 274.

(q) 3 Moore &amp; S. 174.

(r) 5 B. &amp; A. 852.

(s) 1 Beav. 125.

(t) 6 Ves. 94.

(u) 19 Ves. 345; 2 Rose, 182.

\* They also mentioned and commented on *Butcher v. Churchill*, (a) *Ex parte Turner*, (b) *Simson v. Ingham*, (c) *Pease v. Hirst*, (d) *Henniker v. Wigg*. (e) \* 232

*Mr. Wigram* replied.

May 7.

THE LORD CHANCELLOR.—This is a petition of appeal from an order in bankruptcy made by Lord Justice KNIGHT BRUCE when Vice-Chancellor: it was heard by Lord TRURO, when he held the Great Seal, but judgment had not been given by his Lordship when he retired; and the parties having refused to accept his judgment after his resignation, the case was necessarily reheard before me.

The transactions to which the petition relates are of a very remote date, arising out of two bankruptcies in the year 1812. On the 22d July, in that year, a commission of bankrupt issued against Kensington & Co. who were bankers in London; and on the 6th August following, a commission of bankrupt issued against Bulmer & Co., ship-owners at South Shields. Kensington & Co. and Bulmer & Co. were both duly found and declared bankrupts. Bulmer & Co. had dealt largely with Kensington & Co., employing them as their bankers. The present appeal coming on before me under the provisions of the sixteenth section of the Bankrupt Law Consolidation Act, all the facts are stated in a special case, to which therefore I will refer, in order to ascertain the nature of the dealings of these parties.

[His Lordship here stated the several facts above mentioned \* as they appeared on the special case; and after \* 233 reading the order of the Vice-Chancellor of the 1st February, 1850, proceeded as follows:—]

The question which I have to decide is, whether the order I have just read is correct. The assignees of Bulmer & Co., the appellants, contend that it is erroneous; they say, first, as to the two sums of 2495*l.* 3*s.* and 3921*l.* 1*s.* 7*d.*, making together 6416*l.*

(a) 14 Ves. 567.

(d) 10 B. & C. 122.

(b) 3 Ves. 243.

(e) 4 Q. B. 792.

(c) 2 B. & C. 65.

4s. 7d., that this was a cash balance, and must be treated as having been liquidated by the first sums received from the deposited securities, and so that nothing is due on that head ; secondly, they say, that the bills remitted in 1814 and 1815 after the bankruptcy of Bulmer & Co. were remitted under an erroneous impression that Bulmer & Co. were solvent, and they say that these bills constituted part of the assets of Bulmer & Co., and so must be accounted for in full by the estate of Kensington & Co ; and, thirdly, they say, that the assignee of Kensington & Co. cannot be admitted to prove in respect of what their estate has paid to the bill-holders, inasmuch as the case does not come within the terms of the statute as to sureties, and at all events that if he is entitled to any proof, it can only be to stand in the place of the bill-holders to the extent of a proof for 6773*l.* 4s. 4d.

With respect to the first point, the proof admitted for the two sums making together the sum of 6416*l.* 4s. 7d., that turns on the question whether the debt due at the bankruptcy of Bulmer & Co. must be considered as having been liquidated by the first sums which came to the hands of the assignees of Kensington & Co. from the deposited securities. On behalf of the assignees of Bulmer & Co., it was argued that the bills deposited with Kensington

& Co. were so deposited in order thereby to meet all their liabilities on account of Bulmer & Co., \* and so that the first sums actually realized must be considered as liquidating the earlier debt ; that the assignees of Kensington & Co. had no right to treat the debt as continuing, and to keep the proceeds of the deposited securities as a fund to meet their growing liabilities arising from their accommodation acceptances ; but this is a proposition which those now representing the estate of Bulmer & Co. cannot successfully maintain. Where two firms deal together as these firms dealt, the one making payments for and accepting bills for the accommodation of the other, receiving cash and bills from the accommodated firm by way of payment of and security for the outlay and liabilities made and incurred, the question how the proceeds of the bills so remitted by way of security are to be applied, must depend on the contract of the parties expressed or implied. If there is any express stipulation on the subject, that must of course prevail, but in the present case there was no express stipulation : the contract of the parties can only be ascertained by reasoning backwards from their acts, by seeing what their conduct has

been, and thence inferring what it was they had agreed to do. The course of dealing is stated in the case thus: [His Lordship here read from the special case the statement on this point, as above set out]: and the question is, what is fairly to be inferred from this course of dealing as to the terms on which the parties had agreed to deal.

Bulmer & Co.'s assignees say that the fair presumption is, that the parties had agreed that the proceeds of each bill as it was paid should be applied as far as it would go in discharge of the cash balance, that this was the course of dealing actually pursued, and must therefore be assumed to have been followed in pursuance of actual contract. This proposition, however, though to a great extent well founded, must yet be qualified. So long as \* both firms remained solvent, or rather apparently solvent, \* 235 there was no reason for any mode of applying the proceeds of the bills deposited by Bulmer & Co., other than that actually adopted. Unless there was some positive stipulation for a different application of the proceeds, Kensington & Co. would naturally, I might almost say necessarily, apply them as the case finds that they were applied, that is, in discharge of the debt due to them from time to time: there was no other rational mode of keeping such an account between parties who supposed each other to be solvent. But the question is, whether from such a course of dealing it is reasonable to infer an agreement which should control or regulate the mode of applying the proceeds of the bills in the event of bankruptcy,—an agreement which should prevent the party having made a payment as surety, from insisting against the bankrupt principal on the same rights on which he might have insisted in the absence of contract: I think this would be a very unreasonable inference. The bankruptcy, first of Kensington & Co., and then of Bulmer & Co., so completely disturbed all the arrangements subsisting between them, that it would be unsafe and unjust to infer from what had been done previously any agreement as to what should be done in a state of circumstances altogether different.

The question must therefore be dealt with on the footing of there being in the existing state of things no special agreement regulating the appropriation of the fund; and in such a case the doctrine of the Court is clear, that the creditor holding a security is entitled to apply it in discharge of whatever liability of the



bankrupt he may think fit. The authorities referred to on this subject in the argument are conclusive: I allude particularly to the case of *Ex parte Hunter*, (a) \* and to the two cases of *Ex parte Havard* and *Ex parte Arkley*. (b) It was indeed attempted to distinguish the present case from those decisions, because here, before the first dividend was paid under the bankruptcy of Kensington & Co., namely, on the 30th June, 1813, the assignees of Kensington & Co. had realized from the securities a sum of 8483*l.* 11*s.* 6*d.*, being more than sufficient to discharge the original cash balance of 6416*l.* 4*s.* 7*d.*; and it was contended that the sum so realized was necessarily applicable to the liquidation of the then existing debt, that at the times of the receipt of the sums making up the 8483*l.* 11*s.* 6*d.* there was no certainty that Bulmer & Co.'s estate might not discharge all the acceptances, and so that Kensington & Co. had no right to retain cash actually received to meet what was only a possible contingent liability. I do not, however, feel the force of this argument. The right of the creditor to appropriate his securities is a right which accrues to him and is fixed at the bankruptcy of his debtor, and must be regulated by the state of the account then, not by what may be its state at any subsequent time. To say that the creditor may at the bankruptcy of his debtor appropriate his securities to whatever part of the debts and liabilities of the debtor he may think fit, and yet to say that he must apply the proceeds when received in discharge of the earlier debt, is to assert two contradictory propositions. If Kensington & Co. had not become bankrupt, then, on the bankruptcy of Bulmer & Co., which happened on the 6th August, 1812, they would have been entitled to say, We shall hold our securities to meet our accruing liabilities on the acceptances, and shall prove for our cash balance. That which Kensington & Co. might have said, their assignees may say; they were entitled on the bankruptcy of Bulmer & Co. to hold the securities to meet the demands arising on the proofs of \* 237 \* the bill-holders, just as Kensington & Co. themselves might have done if they had remained solvent. The argument proceeded on the assumption, that whenever money of a debtor comes in ordinary course of dealing into the hands of his creditor, it must necessarily be deemed to have so come in order

(a) 6 Ves. 94.

(b) Cooke's Bankrupt Laws, Vol. I., pp. 120, 122.

to its being applied towards liquidation of the debt; but there is no such legal necessity. No doubt in the common transactions of mankind that will be its ordinary application; but parties standing towards each other in the relation of debtor and creditor may surely agree that money received by the latter shall have a specific destination, shall be applied to liquidate a particular class of debts, whether existing or accruing, instead of being treated as general payments on account of sums due; and the rule in bankruptcy as to the right of the creditor to appropriate his securities, puts the parties in the same position towards each other as if they had contracted for a right to make such an appropriation. All the securities deposited by Bulmer & Co. were so deposited in order to enable Kensington & Co. to meet all their liabilities; and when Bulmer & Co. became bankrupt, Kensington & Co., or their assignees, had a right to say to which of those liabilities the deposits should be applied. The order, therefore, authorizing the petitioner, as assignee of Kensington & Co., to prove for the two sums of 2495*l.* 3*s.* and 3921*l.* 1*s.* 7*d.*, making together the sum of 6416*l.* 4*s.* 7*d.*, was perfectly correct.

The order then proceeds to give to the assignee of Kensington & Co. the benefit, as to any future dividends from the estate of Bulmer & Co., of the proofs made against that estate by the bill-holders, until by means thereof he shall have received repayment of the excess \* of the dividends paid by the \* 238 estate of Kensington & Co. to the bill-holders above the said sum of 28,418*l.* 7*s.* 10*d.* The question is, whether this part of the order is right: I think it is. The estate of Bulmer & Co. is the fund primarily liable to pay the bill-holders: it has in fact paid them ratably with the other creditors ten shillings in the pound: the estate of Kensington & Co. has paid the bill-holders the remaining ten shillings, and so has paid them in full. This brings them directly within the statute; for I cannot attach any weight to the argument that Kensington & Co. neither paid the bills in full nor paid a part in discharge of the whole. They paid the debt, the whole debt, within the meaning of the statute, when they paid all which the estate of the principal debtor had not paid, and so relieved that estate from any further demand. If they had literally paid the whole, they would have been entitled to the benefit of the whole proof made by the bill-holders: this was expressly

decided in *Ex parte Brook*. (a) As it was, they paid half, being all which remained due, and so, according to the express provision of the statute, are entitled to stand in the place of the creditor as to the future dividends until by means of those dividends they have been fully satisfied. It was argued that they ought to be treated as having a proof only for the excess now remaining due, and so should receive dividends only on that reduced proof; but this is not what the statute contemplates: it puts the surety in the place of the creditor. If the estate of Kensington & Co. had paid no more than the amount covered by the securities which they held, leaving the surplus still due to the bill-holders, the bill-holders would have been entitled to receive dividends on the full amount of their proofs until thereby their demands were fully discharged. The \* estate of Kensington & Co. is by virtue of the statute substituted for the bill-holders, and so the order is perfectly right.

I have not referred to the second point made by the counsel for the appellants; namely, that the estate of Kensington & Co., before it can be admitted to receive any dividend, must first account for the bills remitted in 1814 and 1815 by the assignees of Bulmer & Co. to the assignees of Kensington & Co. Those bills, which realized to the assignees of Kensington & Co. for the benefit of their estate a sum of 8223*l.* 9*s.* 2*d.*, were, it was contended, part of the assets of the estate of Bulmer & Co., possessed by the assignees of Kensington & Co. with full knowledge of its nature and quality, and for which therefore they are responsible. Owing to the great lapse of time since these transactions took place, it is impossible to ascertain the exact circumstances under which, or the reasons for which, the bills in question were remitted. Probably, the suggestion that it happened because all parties supposed the estate of Bulmer & Co. to be solvent, may be well founded; but I do not think it necessary to speculate on this subject, as the question cannot be raised on the present petition. The official assignee of Kensington & Co. does not dispute his liability to give credit for the sums thus remitted. This he has done; and if the assignees of Bulmer & Co. assert any further right, they must take other steps: it cannot be asserted in the mode now proposed by setting

(a) 2 Rose, 334.

up an alleged misapplication of the assets of Bulmer & Co. as a bar to this right of proof.

The result is, that the present appeal must be dismissed, and the respondents must have the costs of the hearing before me; but I shall not give them the costs of the hearing before Lord TRURO.

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1853. June 23. Before the LORDS JUSTICES.

Where more than two folios in one place are introduced by amendment into a bill, it must be reprinted.

MR. M. A. SHEE applied for a direction to the clerk of records and writs to file an amended bill, which that officer had declined to file, on the ground that the amendments, introduced at one place, exceeded two folios.

The eighth section of the 15 & 16 Vict. c. 86, enacts, that where, according to the present practice of the Court, an amendment of a bill or claim may be made without a new engrossment thereof, or under such other circumstances as shall be prescribed by any general order of the Lord Chancellor in that behalf, a bill or claim may be wholly or partially amended by written alterations. In support of the application it was submitted, that the old rule as to the insertion of two folios was not, in its nature, applicable to the present practice, inasmuch as the interleaving of the printed copies of the bill, filed and served, permitted the introduction of more than two folios without inconvenience. The original bill had cost 15*l.* in printing.

The Lord Justice TURNER said that some rule must be adopted, otherwise the Court must in each case examine the length of the amendments, and determine whether they interfered with the legibility of the printed bill. The Court had no authority to make a new rule on the subject.

The Lord Justice KNIGHT BRUCE concurred, and the application was refused.

\* 241 \* In the Matter of The MIDLAND UNION, BURTON-UPON-TRENT, ASHBY-DE-LA-ZOUCH, AND LEICESTER RAILWAY COMPANY;

AND

In the Matter of The JOINT-STOCK COMPANIES WINDING-UP ACTS.

SIR WM. PEARSON'S EXECUTORS' CASE.

1852. December 20. Before the Lords Justices Sir J. L. KNIGHT BRUCE and Lord CRANWORTH.

1853. January 15. Before the Lord Chancellor Lord CRANWORTH and the Lords Justices Sir J. L. KNIGHT BRUCE and Sir GEORGE TURNER.

At some of the meetings of the managing committee of a provisionally registered railway company, at which A., one of the committee, was present, it was resolved, that certain proceedings should be advertised. At another meeting, attended by four of the body, but not by A., it was resolved that a circular should be sent to the members of the provisional committee, which included the members of the managing committee, stating that, on payment of 160*l.* each, they should be released from all liability. A. and others paid this amount, and A. never attended any subsequent meeting. Meetings of the managing committee were afterwards held, at which some of these payments were referred to, and the terms of the circular were recognized and acted upon. The company was wound up, under the Winding-up Acts, and it appeared that one of the provisional committee had been compelled, by proceedings at law, to pay the bill of the advertising agent: *Held*, that A. was *primò facie* liable for some part of the demand, and was not exonerated by his payment of 160*l.*, and the subsequent conduct of his co-committeemen, but had been properly placed on the list of contributories.<sup>1</sup>

THIS was an appeal from a decision of Vice-Chancellor STUART, removing the names of the respondents from the list of contributories to the above company, and directing the official manager to pay to the respondents their costs of the proceedings before the Master.

The company (which was provisionally registered in 1845) was an association for obtaining an Act of Parliament to authorize the construction of a railway from Atherstone, in Warwickshire, to Ashby-de-la-Zouch. \* Sir William Pearson was a member of the committee of management, which consisted

<sup>1</sup> See 2 Lindley Partn. (Eng. ed. 1860) 1121-1124; Sharp and James's Case, 1 De G., M. & G. 565, and cases in note (1).

of ten persons, appointed from the provisional committee-men.

The committee of management had many meetings for transacting business with a view to the formation of the company, and at these meetings orders were given by the persons present.

At one of these, held on the 17th of October, 1845, at which Sir William Pearson was present, a secretary was appointed at a salary of 300*l.* per annum (which had been paid), and 200 shares were allotted to each member of the provisional committee.

Sir William Pearson also attended at meetings held on the 18th and 21st of October.

At a subsequent meeting, held on the 22d of October, at which Sir William Pearson attended, the following resolutions were passed: "That the business of the company be carried on at No. 18, Abingdon Street, Westminster, so soon as the possession can be had. That Sir William Pearson having viewed the premises and reported the same convenient and necessary for carrying on the business of this company, resolved, that the rent to be paid for the use of one-third of the same for one year shall be the sum of 22*l.* 13*s.* 4*d.*, commencing from the time of possession being given to this company. That the secretary do forthwith proceed to furnish the said premises in a fit and suitable manner for the purpose of the business of the company, and that he be empowered to give proper directions accordingly."

At another meeting, held on the 29th of October, at which Sir William Pearson was present, it was resolved \* that \* 243 the report of the engineer, Mr. Vignoles, should be entered on the minutes, and published in the usual morning papers of the following day and in the railway weekly papers, under the direction of Mr. Baxter, the solicitor.

At a meeting held on the 22d of December, 1845, it was resolved, that, in consequence of the secretary's report of the small amount of deposits, the project should be postponed until the then next session of Parliament; that all further expenditure on account of the company should cease from that day, except such as might be specially ordered by the board; and that the secretary should obtain forthwith an account of all outstanding debts and liabilities of the company.

On the 24th of January, 1846, there was another meeting, at which Sir William Pearson was present, and at which it was

resolved, "That the deposits at the different bankers be paid over to the private account of Charles Holte Bracebridge, Esq., and repaid by him (instead of the bankers) to the claimants, less 2s. per share, to be retained for preliminary expenses."

At another meeting, held on the 4th of March, 1846, at which Sir William Pearson was present, it was resolved, that a circular should be sent to all the provisional directors, requesting them to meet on the 12th day of March, to confer on measures to meet the pressing demands of the creditors of the company, and that the letter should state that a balance sheet of the affairs and liabilities of the company would be laid before the meeting.

A meeting was accordingly held on the 12th of March, which was attended by Sir William Pearson, and at  
\* 244 \* which it was resolved, that a letter should be sent to different allottees; that certain payments should be made to persons who had acted as brokers; that the final consideration of the accounts and the calls upon the directors should be postponed, and that checks should be drawn in accordance with the foregoing resolutions to the amount of 75*l*.

At a meeting held on the 1st of July, 1846, and attended by four members of the managing committee, but at which Sir William Pearson was not present, it was resolved as follows: "That the secretary having ascertained that the present outstanding claims of this company amount to 5763*l*. 10*s*. 7*d*., after deducting the assets, the same be equally divided between the following provisional directors, and payment requested within fourteen days from the present date." The resolution then set forth a list of names, including those of Sir William Pearson and Mr. Norbury, whose case is reported, 5 De Gex & Smale, 423. The resolution proceeded thus: "That the following draft of a letter which has been submitted to this meeting be adopted, and that the secretary forward a copy of the same to each of the above shareholders:—

" 'Midland Union Railway.

" 'Sir,—The total liabilities of this company having been at length ascertained, I am instructed to inform you that the amount due to creditors after deducting sundry small sums obtained from shareholders is 5760*l*., and that your share of the same as one of the provisional directors is 160*l*. On payment of the above sum you will be released from all further liability, and the balance, if

any, which may accrue after the settlement of the claims upon the company will be returned to you. As the creditors can no longer be put off, and legal proceedings \* against individual \* 245 members of the committee may be expected, I am instructed to request that you will without delay — say within ten days — pay the above amount to the bankers of the company, Messrs. Glyn, Halifax, & Co., Lombard Street, London. It will be satisfactory to you to learn that the solicitor of the company has very handsomely withdrawn all claim for professional services. The aggregate amount, therefore, includes only his actual expenses out of pocket.

“ ‘I am, &c.,

“ ‘WILLIAM KNIGHT, *Secretary.*’ ”

A letter in this form was accordingly sent to the directors specified in the resolution, and among others to Sir William Pearson, who paid the 160*l.* thereby demanded, and did not attend any subsequent meeting, or interfere further in the affairs of the company.

On the 30th of July, 1846, a meeting of the managing committee was held, at which a sub-committee was appointed to investigate the accounts and to compromise as far as possible the claims against the company; and it was resolved that one of the provisional directors named in the resolution of the 1st of July, and whose solicitor had attended, should be released from all further liability on the payment of 160*l.*, and that the offer of payment of the same sum should be accepted from another provisional committee-man named in the resolution, and that the secretary should be empowered to write to that effect, and by the authority of that meeting guarantee those two gentlemen, on such payment, from all claim on the part of the creditors of the company.

At a subsequent meeting it was resolved that 100*l.* apiece should be provided by the managing committee-men \* to \* 246 form a fund for ready money to make the best compromise practicable with Mr. Vignoles, the engineer; and in pursuance of the resolutions then passed, the solicitor to the company advanced 1300*l.*, which he paid to the engineer by way of compromise. He claimed to be a creditor of the company to that amount.

Sir William Pearson had died, and the respondents were his



executors, and as such had been placed by the Master on the list of contributories.

The Vice-Chancellor ordered their names to be removed from the list, on the ground that the members of the managing committee who met after Sir William Pearson had paid his 160*l.* could not be supposed to be ignorant of the secretary's letter, and of the payment made by Sir William Pearson in pursuance of that communication, especially as they were found referring to similar payments made by other individuals to whom similar letters had been sent, and affirming the agreement contained in the letter.

The official manager appealed from this decision.

In the course of the argument before their Lordships, a question arose, whether, independently of the effect of the circular and the payment of the 160*l.*, Sir William Pearson was liable to contribute, it being contended that the evidence was insufficient to charge him in respect of the payment made to the engineer. On referring to the proceedings in the Master's office, the counsel for the official manager pointed out a payment to a Mr. Baily, the advertising agent of the committee, for which, or some part of which, they

contended Sir William Pearson was clearly liable.

\* 247 \* The respondents' counsel objected that this was a ground which had not been previously suggested, and which they had had no opportunity of contesting.

*Mr. Roxburgh* and *Mr. W. Morris* supported the appeal.

*Mr. Daniel* and *Mr. Selwyn* appeared for the respondents.

*Blount v. Hipkins*, (a) *Carrick's Case*, (b) *Captain Tanner's Case*, (c) and *Norbury's Case* (d) were cited.

THE LORD JUSTICE LORD CRANWORTH. — We will dispose of this case at once, as far as we can. This is an appeal from an order of Vice-Chancellor STUART, by which he reversed a decision of the Master, placing Sir William Pearson's executors on the list of contributories. Now, in order to place the name of Sir William Pearson's executors on the list of contributories, it must be established that some debt is due and owing from the members of this

(a) 7 Sim. 43, 51.

(c) 5 De G. & S. 182.

(b) 1 Sim. N. S. 505.

(d) *Ib.* 423.

company. I use the word company for the want of a better name; although I do not think that a proper mode of designating the body of persons engaged in the project here in question. It must be shown that some debts are due from these persons, designated the company, to some of which Sir William Pearson's executors are liable to contribute. Before Vice-Chancellor STUART it was not contested, or was barely contested, and indeed was almost if not quite admitted, that Sir William Pearson had been at one time liable to some of the debts \* still remaining unsat- \* 248 isfied. But it was said that the respondents ought not to be placed on the list of contributories, because an arrangement took place whereby that original liability of Sir William Pearson was, in favour of him or his executors, discharged by payment of 160%.

That transaction was of this nature. The company was to have been established at the end of 1845, but funds were not raised, and the company was not formed. The gentlemen acting as the managing committee met from time to time to consider the best course that could be pursued. In July, 1846, a resolution was come to, that application should be made to all the members of the provisional committee, which included the managing committee, calling on them to contribute 160% in full liquidation of all demands. The meeting at which that resolution was come to was attended by four members of the managing committee, of whom Sir William Pearson was not one. They directed a letter to that effect to be written by their secretary to every member. Accordingly a letter was written to every member of the provisional committee, some thirty or forty, including among them Sir William Pearson, who was also a member of the managing committee.

If it be assumed that there were debts to be liquidated, to which Sir William Pearson was liable, as between himself and the creditors, and therefore of course as between himself and the others with whom he was jointly liable, I confess that the argument which has been addressed to us against the view of the case on which the Vice-Chancellor decided it, is to my mind insuperable. The letter of the 1st of July came, not from the four who authorized it, but from the secretary. What is the meaning of that letter? It means, "I, the secretary of the Midland Union Railway Company, or the projected \* Midland Union \* 249 Railway Company, call upon each of you to pay 160%, and you shall be exonerated from further liability." That might have

been a good exoneration to persons, who, being subject to a doubtful liability, were called upon by those whose liability was admitted, offering, on payment of 160*l.*, to exonerate the persons whose liability was doubtful. As addressed to such persons, the letter is intelligible. But, as between the secretary and those members of the managing committee who are *ex concessis* the parties liable, the letter seems nugatory. It is only a statement to them from their own agent, that on payment of 160*l.* each they will be exonerated. I think (speaking for myself, and I believe with the concurrence of my learned brother), with all deference to the Vice-Chancellor, that assuming the original liability of Sir William Pearson to have existed, that original liability was not affected by the letter.

Upon the question, whether there was any such original liability, it appears to me, that unless the allegation can be displaced, that, in consequence of an action brought by Mr. Baily against Mr. Bracebridge, the latter, who was clearly, jointly liable for some of these advertisements, has been compelled to pay for advertisements directed to be published, Sir William Pearson is bound to contribute to the reimbursement of Mr. Bracebridge, and that this would constitute a debt. As, however, this allegation has come by surprise upon the respondents, it is right that they should have an opportunity of answering it if they can.

The case was accordingly ordered to stand over for that purpose, and an affidavit was made by Mr. Macaulay, a member of the provisional committee, stating that an action at law was

\* 250 brought against him in that character \* by Alfred Head

Baily and Charles Edward Baily, advertising agents, to recover 972*l.* for moneys claimed to be due and owing to them from the company for a balance of account of their charges and of payments alleged to have been made by them on behalf of the company in advertising the prospectuses and other advertisements of the company, and for their costs alleged to have been incurred in prosecuting certain actions for the benefit of the company; that, on the trial of the action in 1848, a verdict was given for the defendant, but that a rule *nisi* for a new trial was obtained by the plaintiffs, and afterwards made absolute; and that notice of trial was given. That in the mean time the plaintiffs Alfred Head Baily and Charles Edward Baily had obtained judgment against another of the provisional directors, named Haines, for the same alleged

debt of 972*l.*; and that therefore, for the purpose of avoiding further and unnecessary expense, the deponent took out a summons to stay the proceedings in the action against him, on payment by him of 972*l.* with costs; and that, in pursuance of such summons, and the order made thereon, the deponent was compelled to pay to or for the use of Alfred Head Baily and Charles Edward Baily the sum of 972*l.*, being the amount for which they had obtained judgment against Haines, with their taxed costs of the action against the deponent, making together 1146*l.* 11*s.*, which amount was still justly due and owing to the deponent; and that the company then were and stood justly and truly indebted to him in the sum of 1146*l.* 11*s.* 6*d.*, and also in the further sum of 211*l.* 17*s.* 8*d.* for the costs incurred by the deponent in defending the action against him, making together 1358*l.* 8*s.* 8*d.*

No further affidavit was filed on behalf of the appellants.

1853. January 15.

\* The case came on again this day before the full Court of \* 251 Appeal.

*Mr. Daniel* and *Mr. Selwyn*, for the respondents, stated that the debt, as to which there had been a discussion on the former hearing, now appeared to have arisen out of an order given at one of the meetings of the managing committee; that the creditor took proceedings at law to recover it against several of the directors; and that ultimately it was paid, together with the costs at law, by one of the provisional directors, and not by *Mr. Bracebridge*, the chairman. They contended that this was not a common liability of the members of the company directed to be wound up; and that, therefore, it was not a debt in respect of which *Sir William Pearson* could be called on to contribute under the Winding-up Acts. [They cited *Wryghte's Case* (a) and *Hutton v. Upfill*. (b)]

*Mr. Roxburgh* and *Mr. W. Morris*, for the official manager, were not called on.

THE LORD CHANCELLOR. — We have no doubt in this case. The question which came before the Lords Justices before Christmas

(a) 2 De G., M. & G. 636.

(b) 2 H. L. Cas. 674.

was upon an application to discharge an order of Vice-Chancellor STUART, by which he had ordered the names of Sir William Pearson's executors to be removed from the list of contributories, the ground of this decision being that a certain transaction, which took place in 1846, had released Sir William Pearson in his lifetime from all liabilities, whatever those liabilities had been. In

this view of the case the Lords Justices did not concur; \* 252 \* and the names of the executors would therefore have been replaced on the list; but a doubt was raised whether there was evidence that there was any original liability on the part of Sir William Pearson, and, in respect of the debt which had been relied on, namely, that of Mr. Vignoles, whether there was any debt at all. It was said, however, that, independently of that debt, there were others in respect of which Sir William Pearson was liable; and among these a debt was selected, said to be due to Mr. Baily, the advertising agent, and as to that, it was said that Sir William Pearson was liable, having concurred in giving the orders under which it was incurred. The Lords Justices said that they did not inquire whether the debt in respect of which Sir William Pearson was liable was to a larger or smaller amount, but that if he was liable to any thing, his name must be on the list of contributories. At the moment Mr. Daniel was not able to explain the transaction, and it was thought that he ought to have time to look into the matter. This he has now done, but he has not succeeded, for I entertain no doubt that there was a debt of the company for which Sir William Pearson was liable.

The orders under which these companies are wound up are often loosely worded, and in nine cases out of ten they speak of a company, whereas in truth what is intended is an association united for the purpose of forming a company, an object which in the case before the Court, as in many others, was not accomplished. The question then is, was Sir William Pearson a member of this body, of this association for the purpose of forming the Midland Union Railway Company? This cannot be disputed: he was one of the managing committee, and the only question is, whether this debt is one in respect of which the managing committee were liable.

\* 253 There \* can be no doubt about this. The managing committee took upon themselves to form the company; they held meetings, at most of which Sir William Pearson was present and concurred in the proceedings, and as to the others he must

have read the minutes and seen what was done. This was a course of dealing which can create no doubt but that each of the members sanctioned what was done at the meetings at which he was present, and also at those at which he was not. The debt therefore incurred in ordering the advertisements was a debt of the whole body of the managing committee, the body whose affairs are being now wound up. I am thus of opinion that Sir William Pearson's executors are rightly placed on the list of contributories.

THE LORD JUSTICE KNIGHT BRUCE. — Perhaps in this case the order for winding up ought not to have been made. Perhaps it ought to be discharged; but that order standing, and not being questioned, and the ground upon which his Honor the Vice-Chancellor proceeded having been held insufficient, I cannot doubt that Sir William Pearson's executors must remain where they are.

THE LORD JUSTICE TURNER. — The body of persons called in the order in this case The Midland Union Railway Company, was in substance no more than an association for the purpose of endeavoring to form a company. Of that body it is clear that Sir William Pearson was one. The question then is, whether or not there is a debt for which Sir William Pearson is liable? It may be true, as was stated, that for some parts of the debt in question he might not be liable; but it is equally clear that in the present state of the evidence, it would be unsafe to assume he was not liable for other parts of the debt. His name therefore must remain on the list.

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\* In the Matter of The DOVER AND DEAL RAILWAY, \* 254  
CINQUE PORTS, THANET, AND COAST JUNCTION  
COMPANY, and of the JOINT-STOCK COMPANIES WIND-  
ING-UP ACTS, 1848 and 1849.

#### MOWATT AND ELLIOTT'S CASE.

1853. January 18, 27. February 8. Before the Lord Chancellor Lord CRAWFORD and the LORDS JUSTICES.

An allottee of shares in a projected railway company paid the deposit on them and executed the subscriber's agreement; he did so on the faith of a letter

circulated by the provisional directors undertaking to return the whole deposit in the event of the Act not being obtained: the subscribers' agreement was in the usual form, and contained a covenant by the shareholders to indemnify the provisional directors whether the Act should or should not be obtained. The directors failed to obtain the Act of Parliament, and the company was wound up under an order obtained for that purpose. *Held* that, as between the directors and the allottees, the former were primarily liable for all costs connected with the winding up of the concern; and a call made in respect of such costs was discharged accordingly, there being nothing to show that the directors were unable to pay the amount required by the official manager.<sup>1</sup>

THE Master charged with the winding up of the above company having, by an order dated the 23d July, 1852, directed Mr. F. Mowatt and Dr. W. Elliott respectively to pay a call of 1l. 7s. per share on the shares held by them, and the Vice-Chancellor KINDERSLEY having, by an order dated the 2d December, 1852, dismissed an application to discharge this order, (a) the case now came on by way of appeal, upon separate motion by F. Mowatt and M. Elliott, to discharge both orders. The following were the circumstances out of which the question arose.

The company was projected in the latter end of 1845, and was provisionally registered on the 3d October, 1845. A meeting was held on the 24th October, 1845, at which several gentlemen were present, and resolutions were passed forming the company, fixing the capital, appointing bankers, and appointing Messrs. Hook \* 255 and \* Thompson to be the solicitors. Another meeting took place on the 1st November, 1845, at which a committee of management was appointed with Lord Albert Conyngham (afterwards Lord Londesborough) at the head. Other meetings were held in reference to an arrangement which was in course of negotiation with the South-Eastern Railway Company, the general nature of which was that the South-Eastern Company should undertake, if the Act of Parliament passed, to give to the shareholders in the projected company shares in the South-Eastern Railway, but if the Act did not pass, then that the South-Eastern

(a) See 1 Drew. 247.

<sup>1</sup> See 2 Lindley Partn. (Eng. ed. 1860) 1098, 1116, 1139-1141; Woodfall's Case, 3 De G. & S. 63; Londesborough's Case, 4 De G., M. & G. 411; Carew's Case, 7 De G., M. & G. 43; Mowatt v. Londesborough, 3 Ell. & Bl. 307; Clifton's Case, 5 De G., M. & G. 743.

Railway Company should defray all the expenses connected with the prosecution of the undertaking.

The solicitors of the company having reported that the plans, sections, and books of reference had been deposited in compliance with the standing orders of Parliament, a meeting was subsequently held on the 24th January, 1846, at which the solicitors reported the result of their negotiations with the South-Eastern Company, and read a letter that had been settled and approved of by them, and which was proposed to be addressed to each applicant for shares, and a resolution was passed adopting that letter and directing it to be sent accordingly: resolutions were also passed as to the reservation of shares to directors and officers of the company. The letter referred to in the resolution was as follows: "Dover and Deal Railway, 7 Coleman Street, 24th January, 1846. Sir, — In forwarding you the accompanying letter of allotment, the directors desire to explain that they have delayed issuing any shares until the standing orders of both Houses of Parliament had been complied with, and certain arrangements entered into with the South-Eastern Railway had been brought to a conclusion. The directors have now the greatest satisfaction in stating, that arrangements with the South-Eastern Company have been concluded, \* and they are fully justified in asserting that the \* 256 company will be placed in such a position as to insure the proprietary against loss, and in the event of the passing of the bill shares in the South-Eastern Railway will be allotted to the proprietors in lieu of stock in this company. The directors in making this announcement feel that the affairs of the company as now settled are on such a basis as to secure important advantages to its proprietors, and to warrant the directors in proceeding to Parliament with the undertaking with every prospect of success. In the event of the Act not being obtained, the directors undertake to return the whole of the deposits without deduction. By order, S. P. HOOK, G. T. THOMPSON, *Joint Solicitors*."

Although there had been applications for shares as early as November, 1845, no allotments had down to this time been made. In consequence, however, of the resolution just mentioned, the circular was on the 26th January, 1846, inserted as an advertisement in the daily papers, and a copy of it was sent with the letter of allotment to each applicant to whom shares were allotted. The letter of allotment was in the usual form, announcing to each



allottee that on executing the parliamentary contract and the subscribers' agreement he would obtain scrip in the company in exchange for the bankers' receipt for the deposit on the shares. The parliamentary contract and subscribers' agreement bore date the 1st January, 1846; the subscribers' agreement contained a clause, that the provisional directors should be fully indemnified against all contracts, arrangements, acts, and things whatsoever entered into, made, done, and authorized by them in pursuance of the powers and provisions of the deed, and empowering them to reimburse themselves out of the funds of the company all costs,

losses, damages, and expenses which they might incur or  
 \* 257 be put to in, \* about, or incident to all such contracts, arrangements, acts, and things; and that whether the Act or Acts of Parliament should or should not be obtained, the several persons parties thereto of the first part would save harmless and keep indemnified the provisional directors from and against all costs, charges, damages, losses, and expenses which they might incur, adopt, sustain, be at, or be put unto, in, or about the execution of the trusts, powers, directions, and authorities committed to them by the deed, such costs, charges, damages, and expenses to be respectively computed, assessed, paid, and made good by the several persons parties thereto of the first part respectively and their respective executors and administrators ratably according to the amount of the sum subscribed by the said several persons respectively.

It appeared that a copy of the circular was inclosed by Mr. Hook to, and received by, Dr. Elliott on the 24th January, 1846, accompanied by the following letter: "My dear Sir. — Dover and Deal. — If you would like a few of these shares, I could get them for you; you will observe from the accompanying paper that they will be better than South-Eastern shares, inasmuch as in the event of our not getting our Act the whole of the deposit money will be returned. This is a boon not to be met with every day; you must, however, be quick, for to-morrow we allot; the arrangement is that we have a guarantee from the South-Eastern Company against all expenses. In haste I am, my dear Sir, very truly yours, S. P. Hook. 7 Coleman Street, 23d January, 1846. Dr. W. Elliott. — P. S. You will probably regard this as a little scheme, but it should not be so looked upon, as it is in fact a branch in continuation of the South-Eastern Company's lines."

In consequence of this letter, Dr. Elliott immediately \* called on Mr. Hook, but did not find him at home. On \* 258 the same day, however, he received from Mr. Hook the following letter, inclosing the circular attached to the names of the committee of management and other particulars respecting the company: "7 Coleman Street, 24th January, 1846. — My dear Sir, — I am sorry that I was not in the way when you called this morning; the aspect of the Dover and Deal Railway is this morning very different to what it was when I wrote you last evening, and so much so that we shall have no occasion to allot to promiscuous applicants, but shall be able to reserve our shares to respectable persons. I shall have much pleasure in allotting you 100 shares, and some friends of yours the same number each to a limited extent; but as our deed must be executed in the course of the ensuing week, I should like to receive your list by Monday next. I inclose you a 'printed copy' of the letter I wrote you yesterday. I am, my dear Sir, yours very truly, S. P. Hook." The result of this communication was that Dr. Elliott agreed to take, and he paid the deposit on three hundred shares, and on the 2d February, 1846, he executed the subscribers' agreement and parliamentary contract in respect of these shares.

It appeared also that Dr. Elliott showed Mr. Hook's last letter to Mr. Mowatt, who thereupon took two hundred shares, and on the 29th January, 1846, executed the subscribers' agreement and parliamentary contract, and paid the deposit accordingly. A few days afterwards Mr. Mowatt, acting on the persuasion of Mr. Hook, as will be found stated by the Lord Chancellor in his judgment, took and paid the deposit on fifteen hundred and seventy-five more shares, and executed the subscribers' agreement and parliamentary contract a second time in respect of those shares, on the 4th February, 1846.

\* The directors proceeded with their application to Par- \* 259 liament, but failed in obtaining their bill; and they returned to the shareholders one pound per share out of two guineas per share, the amount of their deposits. They then called upon the South-Eastern Railway Company to indemnify them from the expenses they had incurred; and on the South-Eastern Railway Company refusing to do so, they brought an action. An order having been obtained for winding up the company, the official manager was substituted as plaintiff in this action, and a judg-

ment was in the first instance obtained for the plaintiff, but it was reversed by the Exchequer Chamber on a writ of error. (a)

The Master, at the instance of the official manager, made the call now in question to meet the expenses incurred in winding up the company, a principal part of these being for the costs of the action against the South-Eastern Railway Company.

The present appeal came on originally before the Lords Justices on the 12th January, 1853; but on the suggestion of their Lordships, and apparently because there was no case in which the Court had held a call to be bad upon a ground which would have been sufficient to prevent the person the subject of it from being a contributory at all, it was directed to stand over to be heard before the full Court of Appeal. (b)

\* 260     \* *Mr. Roxburgh*, in the absence of *Mr. W. T. S. Daniel* and *Mr. Willes*, who were with him, argued the case in support of the appeal. — He contended that he was entitled to use the same arguments on the question of the validity of the call, as would apply to the question of whether the person on whom the call was made was or not a contributory: *Bright v. Hutton*; (c) that the directors were bound to return to all who signed the subscribers' agreement the amount of their deposits without any deduction, these parties being in no way interested in the action against the South-Eastern Railway Company, and not being liable for any of the expenses of winding up the concern; that the execution of the subscribers' agreement and parliamentary contract, when coupled with the circular of the 24th January, 1846, could create no liability in the allottees; that the Master ought to have divided the contributories into two classes, the directors being one class, and the allottees who had executed, the other class, and

(a) 17 Jur. 21.

(b) The call was also objected to, especially as to *Mr. Mowatt*, in point of form; but the way in which the matter was ultimately dealt with by the Court renders it unnecessary to report the argument on this portion of the case. A great deal of discussion also took place as to whether it had been proved or admitted before the Master that *Mr. Mowatt* and *Dr. Elliott* received the letter of the 24th January, 1846, before executing the deed; and in consequence of this, the case stood over from the 27th January, to give opportunity of having the point cleared up. The facts were ultimately established as stated and referred to in the above report.

(c) 3 H. L. Cas. 341.

should then have determined that the directors were bound to pay all the expenses, and, instead of making a call on the allottees, should have ordered the directors to pay over to the official manager the balance of the deposits remaining in their hands beyond that which they had returned, thus keeping the allottees on the list of contributories for the purpose of receiving back their portion of the money to be paid by the directors. He submitted that under all the circumstances the appellants were not liable to creditors, and *a fortiori* not to the directors, and that at all events with regard to any claim by the latter the letter of the 24th January, \* 1846, was a complete answer. He noticed *Gay's* \* 261 *Case* (a) as having been cited on the other side, and argued that it was essentially different from the present case, observing that the proposition established by it was, that before a call can be made against an individual for costs, it must be established that he is liable to creditors. He also cited *Hunter's Case* (b) and *Carriek's Case*. (c)

*Mr. W. T. S. Daniel* and *Mr. Willes* followed on the same side.

*Mr. Glasse* and *Mr. Selwyn*, for the official manager, supported the order appealed from. — They relied on the view taken of the case by the Vice-Chancellor, contending that the subscribers' agreement constituted the contract by which the parties signing it must be bound, and that under it the directors were entitled to be indemnified. They referred to the decision in the action against the South-Eastern Railway Company, as showing that the guarantee relied on was altogether illegal and void. They cited *Markwell's Case*, (d) *Roberts's Case*, (e) *Bernard's Case*, (g) *Gay's Case*. (a)

Without calling for a reply, —

THE LORD CHANCELLOR. — I do not think we need trouble counsel to reply. Considering the very high authority that there

(a) 1 De G., M. & G. 347.

(c) 1 Sim. N. S. 505.

(b) 1 Sim. N. S. 485.

(d) 16 Jur. 989; since reported 5 De G. & S. 528.

(e) 3 De G. & S. 205.

(g) 5 De G. & S. 283.

has been in favour of the present decision, that of the  
 \* 262 \* Master originally, and the same view taken by the Vice-Chancellor KINDERSLEY, we should probably, however strong the opinion we had formed might have been, have thought it prudent to have heard the matter fully out, and have taken time to consider the subject; but from the delay which has taken place, the matter having been opened before us nearly a month ago, and then again gone into a fortnight ago, and a third time to-day, we have had such ample time to reflect on the subject that we do not think any further consideration would be of any use.

The question is this: There having been an order for the winding up of this company, the usual proceedings have been taken; all the shareholders in the company, including Mr. Mowatt and Dr. Elliott, have been placed upon the list of contributories, some expenses have been incurred by the official manager in endeavouring to get in what are supposed to be outstanding assets of the company, and there being also proof of debts to the amount of 200*l.* by persons extra the company against whoever are liable, the Master has made a call on all the shareholders ratably according to the number of their shares, for the purpose of liquidating these demands. Whether such a proceeding was just or not is the question which we have to decide.

From the cursory view that I have been able to take of the report of the case before the Vice-Chancellor KINDERSLEY, I confess a doubt has crossed my mind whether the precise point was ever very distinctly brought before that very learned and accurate Judge. I need not, however, speculate upon that, because speaking for myself, and I believe speaking also the sentiments of both the Lords Justices, the case appears to be one very nearly free from any doubt or difficulty.

\* 263 \* This company being, as it seems, unable to get people to take shares, and in order to induce them to do so, entered into an arrangement, — whether they had authority or not seems to me utterly immaterial to this question, — with the directors of the South-Eastern Company, by which they thought that they would be put on a good footing, and, by making certain sacrifices themselves by reason of advantages to be derived from the South-Eastern Railway Company, induce persons to take shares which they were not ready otherwise to take. They accordingly, that is, the persons who were then exercising the functions of

directors of this company, namely, the Right Honourable Lord Albert Conyngham, Henry Beauclerk, Esq., and the Honourable H. M. Gore, on the 24th January, 1846, passed the following resolution: "The solicitors reported the result of their negotiation with the South-Eastern Railway Company, and read the letter that had been settled and approved of by them, which was proposed to be addressed to each applicant for shares; it was resolved that the letter be adopted and sent accordingly." The letter was in these words: [His Lordship here read the letter as above set out.]

Construing this letter as you will, it at least amounts to an undertaking by the directors to indemnify the parties against all loss from taking shares provided they do not obtain an Act of Parliament. This took place on the 24th January; and it is in evidence uncontradicted, that so early as the 26th January the letter appeared in the form of an advertisement in the newspapers; and the solicitors of the company, and of course either of them, had authority from the directors to circulate it in order to obtain the shares to be taken.

It appears that Mr. Hook, one of the solicitors, being, \* I suppose, a friend of Dr. Elliott, and thinking that this \* 264 was, or was likely to be, a profitable thing, sent him very early a copy of the letter, announcing to him what the advantages would be, pointing out of course that it was a very great advantage that the parties taking shares were taking the chance of gain with an indemnity or what necessarily amounted to an indemnity against loss,—against loss at least if the Act of Parliament was not obtained; he writes, "I shall have much pleasure in allotting you one hundred shares, and some friends of yours the same number each to a limited extent; but as our deed must be executed in the course of the ensuing week I should like to receive your list by Monday next." That was exactly in conformity with the directions which had been given by the resolution of the meeting; and in endeavouring to circulate the announcement as effectually as possible, the solicitor thus sends the letter to Dr. Elliott, and in truth substantially desires him to circulate it amongst others. I allude to that because it was suggested in argument that this letter had never been sent to Mr. Mowatt, though I think that is a point that it would be impossible seriously to argue. The object was that the intelligence should be circulated among those who were purchasing shares, and it is sent with that express

object to Dr. Elliott, in order that he might show it to his friends. Mr. Mowatt being one of his friends, it was so shown to him in a day or two, I think on the 26th January, and, being called upon to act immediately, he instantly goes, as he states, not only with the semblance of truth, but demonstrably what must be the truth, fresh from the reading of that letter and subscribes for a large number of shares, and executes the deed. That was on the 29th January, and on the 2d February, Dr. Elliott executes the deed, having received the letter as I have stated. The company were still unable

\* 265 to dispose of their shares, and in a day \* or two afterwards, on the 4th January, Mr. Hook, the solicitor, evidently acting on the authority given to him and discharging the duty which that authority imposed upon him of endeavouring to dispose of shares on the footing of the letter, sees Mr. Mowatt, has a conversation with him, and I will not say urges him to take more shares, but rather presses him to do so. Mr. Mowatt says that he must have a letter from the committee stating that these are the terms upon which he is to take the shares. Mr. Hook remonstrates against this, saying that he did not think the committee was sitting, but that it does not signify: in fact it did not, because the committee had authorized him to send the printed letter. He, however, goes; and, finding the committee had broken up, he sends a letter to Mr. Mowatt urging him to take the shares and inclosing him a printed copy of the letter which has been so frequently mentioned; and upon the faith of that Mr. Mowatt signs the deed. I should add that in both cases he paid his deposit according to the terms of the instrument.

When, then, Mr. Mowatt had thus executed the deed, what was the relation which subsisted between himself and those who had given him that which I call a guarantee? It is useless to speculate what would be his obligation as to other persons, whether under any possible circumstances he would be liable to creditors, or how he would be liable to other parties; but the whole body being brought before the Court, including those who had agreed to indemnify Mr. Mowatt and those who had not so agreed, and it being needful to raise money for the purpose of what I may call the common concern, the question is, who are the parties primarily liable to pay that demand. Can there be the least doubt that, as

between Mr. Mowatt and Lord Albert Conyngham and the  
\* 266 two other gentlemen who caused \* that letter to be sent

to him on the faith of which he took the shares and signed the deed (even if Mr. Mowatt is liable to other contributories), they are liable to indemnify him. It is impossible to reason upon it; the statement of the proposition makes it as clear as any reasoning could. The persons primarily liable are those who induced Mr. Mowatt to subscribe the deed upon the assurance that if he did he should be indemnified. It was urged in argument, that he signed the deed after he had entered into the agreement. No doubt where there is an agreement, and in order to carry that agreement into effect the party executes a deed, the deed is that which is *prima facie* to be taken as speaking the intention of the parties; but that was not what was meant here; it never was meant that the deed should be an embodiment of the agreement; on the contrary, the agreement, the guarantee, was something entirely collateral to the deed.<sup>1</sup> The directors said to Mr. Mowatt, "If you will execute the deed, we will indemnify you;" he did execute the deed, and now they say, "We are not the persons to indemnify you." I think they entirely fail in that argument.

With respect to *Gay's Case*, (a) which is the authority that has been relied on, the distinction is manifest. There, in the first place, there was no express agreement to indemnify, although, perhaps, there was something that amounted to the same thing: the directors had had deposited with them by the great body of the shareholders sums of money to be applied to the purposes of the inchoate concern, and I think it appeared that that fund had not been exhausted, or, if properly applied, would not have been exhausted; then the affair was wound up, and it was said, and truly said, that the first fund applicable \* to the pay- \* 267 ment of these outstanding demands, and to the payment of the winding up, including the costs, was the fund made up by what the contributories had placed in the hands of the managing directors, and that it was hard to call upon the shareholders, who were not liable till that fund was exhausted. So far from *Gay's Case* having decided contrary to that reasoning, the Lord Justice KNIGHT BRUCE and myself quite felt and admitted the force of it; but what was said in the course of the argument was, that the Court was called upon to exercise a sort of administrative duty,

(a) 1 De G., M. & G. 347.

<sup>1</sup> See *Mowatt v. Londesborough*, 3 Ell. & Bl. 307.



that it ought to take some practical step for getting the money, and that it was idle to go through the ceremony of first making a call on seven persons, most of whom had gone abroad, and all of whom were totally insolvent. Feeling the force of that argument, what we did was to direct an affidavit to be made on the subject, and an affidavit was made, that satisfied us that there was no reasonable chance of recovering one sixpence from any of the persons primarily liable: they had imprudently, I do not say whether fraudulently or not, wasted the whole of the fund. That being so, and as it was necessary that the money should be raised, we said that all the contributories were liable, the proportions in which they were liable had been ascertained, and that if it should turn out that any of those primarily liable were solvent, there would be a remedy against them. In the present instance the fund must be raised, but I believe nobody suggests insolvency on the part of the directors, who are the persons primarily liable: the decision, therefore, in *Gay's Case* has no practical application.

It appears to me that the call, as far as Mr. Mowatt and Dr. Elliott are concerned, must be discharged, and the proper directions given for that purpose.

\* 268      \* THE LORD JUSTICE KNIGHT BRUCE. — I assume in favour of the respondents that the costs and expenses incurred by the official manager, of which the main object of the call is to procure payment to him, were properly incurred, and that they ought to be repaid to him, and must be so. But the question is, how are they to be repaid? I assume also in favour of the respondents, but without deciding, that in a certain order, and in a certain sense, the appellants before us are liable to him for those costs and expenses. The question is, in what order and in what manner?

I agree also that generally where a man has two debtors, of whom, as between themselves, one is bound to indemnify the other, the creditor may proceed against both or either, and leave them to settle the matter between themselves. This, however, is not exactly that case. It is a question under the Acts of Parliament, called "the Winding-up Acts," and the Master has before him the official manager and all the contributories. The contributories stand, as between themselves, in distinct classes, as some of them, at least, allege. One class, in the present instance, may

be considered as represented by the appellants; the other class may, for the present purpose, be considered as represented by Lord Londesborough, Mr. Beaclerk, and Mr. Gore. As between the two classes, it is asserted by the appellants that the other class ought to bear every thing, and to indemnify them from all the consequences of having become associated with this company or undertaking. Have they given evidence of that before the Master? In my opinion they have given strong *prima facie* evidence, — such evidence as, in my judgment, to render it a proper course of proceeding fully to investigate the matter and to adjudicate between the classes, who at the stage of a call, ought first or alone to be \*made liable; whether first or alone is for the present \* 269 purpose immaterial. The matter does not appear to me to have received sufficient investigation. It would be premature — it would be impossible, I think, now to decide that, as between the two classes, one is liable before the other. Though, if the matter were to rest here, I should have no hesitation what answer to give to the question upon the evidence before us. The course to be taken must, I think, be to remit the whole case to the Master, in order that he may investigate the claims of these appellants, either to be discharged wholly, or not to be charged until other persons, whose solvency is undoubted, shall have been well ascertained to be, or not to be, liable in preference to them, as between themselves.

The truth I believe to be that these appellants, rightly or erroneously (I say not which), have been so possessed with the notion that they were in no order, in no rank, in no sense, in no event, liable, that the view of the case to which I have adverted has not been presented with the force and clearness with which otherwise it might have been presented, either to the Master or to the Vice-Chancellor. I am of opinion that the case is not, at present, in such a state, as that, without a probable or certain failure of justice, the call, as it is, can be acted upon against the appellants.

THE LORD JUSTICE TURNER. — I agree in the conclusions that have been expressed in this case. This is a call for the purpose of recovering debts which are alleged to be due from the company, and for recovering costs said to have been incurred for the benefit of the common fund belonging to the company. It is not pre-

tended, and has not been urged, that as to creditors, Mr.

\* 270 Mowatt is under any \* liability; and as the case stands as to costs, I am clear upon the present evidence, that as between Mr. Mowatt and the directors of this company, the directors are primarily liable in respect of these costs. There are two views which strike my mind upon that point. The one is, that on the terms of the agreement which is entered into between these parties, and upon which Mr. Mowatt signed the deed, the directors agreed that if the Act of Parliament did not pass, they would repay the whole amount of the deposit, which in truth is an agreement that they will not charge the shareholders who signed upon the faith of that letter any deduction in respect of the costs which might be incurred. The other view which has struck my mind upon this question is this: supposing Mr. Mowatt to have been sued upon a covenant contained in that deed, in respect of the costs incurred by the directors, is it not clear that a Court of Equity would restrain the proceedings in that action upon the ground of the contract entered into with Mr. Mowatt, upon the faith of which he had signed? I think, that as between Mr. Mowatt and the directors of this company, the directors were primarily liable in respect of these costs. I am speaking, of course, upon the evidence as it stands before us at the present time. These calls must be made according to the Act of Parliament,—according to the liabilities of the parties at law and in equity; but it is said that there may be other parties in respect of whom Mr. Mowatt may be under some liability to contribute. I am not satisfied upon the evidence as it stands that there are any such parties. Assuming, however, that there are, still, upon the evidence as it stands, there is a primary liability of the directors. The case stands thus: There are parties primarily liable, and parties secondarily liable; and the question is, in what mode the call ought to be made in a case where there are parties

\* 271 primarily liable, and as to \* whom there is no doubt of the power of recovering calls, and also parties secondarily liable. Nothing would be more inconvenient, in carrying out the provisions of the Act of Parliament, than to call upon parties who are secondarily liable to pay at a time when there are parties who are primarily liable; because the consequence of that would be that, in further working out the provisions of the Act of Parliament, it would be necessary that further calls should be made, for

the purpose of indemnifying the parties upon whom the first call has been made against the payments which they have been compelled to make, in the place of the parties primarily liable. I think, therefore, resort ought not to be had, in working out this Act of Parliament, to parties who are secondarily liable only, unless it is clear there is a difficulty in recovering the calls against the parties primarily liable.

The order for the call was discharged. Costs of all parties to come out of the estate.<sup>1</sup>

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\* In the Matter of the VALE OF NEATH AND SOUTH \* 272  
WALES BREWERY COMPANY, and In the Matter of  
The JOINT-STOCK COMPANIES WINDING-UP ACTS.

### KEENE'S EXECUTORS' CASE.

1853. January 12. Before the LORDS JUSTICES.

A clause of a partnership-deed, however precise, may be waived by the conduct of all the partners, but a waiver of the stipulations of a company's deed by the directors is not sufficient, unless it is shown that the body at large made the directors their agents for that purpose.<sup>2</sup>

Where, therefore, a shareholder bequeathed his shares, and the executor assented to the bequest, and the secretary placed the name of the legatee and her husband opposite the shares in the books of the company, but the provisions of the deed of settlement had not been complied with as to the transfer of the shares, nor was it shown that all the shareholders of the company had concurred in dispensing with such compliance: *Held*, that the executor was the proper person to be placed on the list of contributories under the Winding-up Acts.<sup>3</sup>

THIS was an appeal of the official manager of the above company from the decision of Vice-Chancellor STUART reversing the

<sup>1</sup> See 2 Lindley Partn. (Eng. ed. 1860) 1145.

<sup>2</sup> See 1 Lindley Partn. (Eng. ed. 1860) 510 *et seq.* 677; Collyer Partn. (5th Am. ed.) § 212, and cases in note.

<sup>3</sup> See 2 Lindley Partn. (Eng. ed. 1860) 870, 871, 895, 1095, 1096, 1130, Blakesley's Case, 13 Beav. 133, and 3 M'N. & G. 726; Crosfield's Case, 2 De G., M. & G. 128; 4 De G. & S. 338; Hamer's Devises Case, 2 De G., M & G. 366; 3 De G. & S. 279; *Ex parte* Brown, 19 Beav. 97.

decision of the Master, and directing the name of the respondent, Samuel Thomas Wood, to be placed upon the list of contributories as executor of Lydia Keene, only in respect of losses occurring up to the time of her death.

The testatrix was at the time of her death proprietress of five shares in the Vale of Neath Brewery Company. By her will, dated in July, 1842, she gave and bequeathed unto her sister, Mary Cadby Keene, her household furniture, books, clothes, her shares in the Vale of Neath Brewery Company, and all other the residue of her personal estate. She appointed her brother, William Keene, and the respondent Wood her executors, both of whom proved the will. Some of the circumstances of the case and of the clauses of the deed of settlement of the Vale of Neath Brewery

Company will be found in the report of *Kluht's Case*, (a)

\* 273 where it was decided that \* the husband of the above legatee was not liable in respect of the shares now in question.

By the 38th clause of the deed it was provided that husbands of female proprietors, executors, administrators, or legatees might, with the approbation of the directors, to be manifested as in the deed mentioned, but not otherwise, be admitted and become proprietors of the company in respect of the shares which belonged to or were claimed by them as such; but if they did not obtain the approbation of the directors to be admitted proprietors, they should, within six months after becoming entitled to such shares, sell and dispose of the same, and, on their refusal or neglect so to do, should forfeit the said shares for the benefit of the other proprietors of the company. And that every purchaser or transferee of a share or shares, and every husband, administrator, and legatee who should have obtained the approbation of the directors to be admitted a proprietor in respect of the shares belonging or claimed by him or her respectively as such, should, unless already a proprietor in respect of some other share or shares, execute the deed of settlement, or some deed of accession thereto binding himself or herself to conform to, observe, and abide by all stipulations, regulations, and provisions for the time being, affecting, or intending to affect, the proprietors of shares in the capital and property of the company, and, until he should do so, should not become a proprietor of the company.

(a) 2 De G. & S. 210.

The 41st clause provided (among other things) that the approbation of the directors should be manifested by entries or memorandums to that effect in the share register book, under the signature of two of the directors for the time being.

\* The 44th clause provided that whenever any share or \* 274 shares in the capital of the company should become actually forfeited, or should be duly and effectually vested in any new proprietor, and such entry or alteration in regard to such share or shares should have been made in the share register book as therein-before required; then, and not before, the responsibility of the previous owner as a proprietor in the company with respect to the same share or shares, should, from and after the completion of such entry and certificate granted as aforesaid, and the payment of all instalments on such shares previously called for, cease and determine as to the same share or shares.

The testatrix had not executed the above deed of settlement, but on the purchase of her shares she had executed a deed dated the 14th December, 1841, being the instrument of the transfer of the five shares to her, and thereby covenanted for herself, her heirs, executors, and administrators, that she, her executors, administrators, and assigns, would in all respects, whilst she should continue a holder of any shares of the company, well and truly observe, perform, and fulfil, and keep all the covenants, articles, stipulations, and agreements, which were or ought to be observed, performed, fulfilled, and kept by her, her executors, and administrators respectively, in respect thereof, or in relation to such shares for the time being remaining in her name in the books of the company, according to the true intent and meaning of the same covenants, articles, stipulations, and agreements.

The testatrix died on the 8th of July, 1842, and in November, 1842, the legatee married Mr. Kluht.

In August, 1842, Mr. W. Keene, the acting executor, \* who had shares of his own in the company, and who had \* 275 acted as agent of Miss M. C. Keene with reference to other shares held by her in her own right in the company, wrote to the secretary of the company the following letter with reference to a dividend declared shortly after the death of the testatrix: "Troughbridge, August 18, 1842. Dear Sir,—I duly received the notice from the directors respecting the dividend to be paid on the 1st of September, and beg to inform you that my sister, Miss M. C.

Keene, is and will be at my house, so that she will thank you to forward her dividend here. I have also to request that you will send the amount due to Miss Lydia Keene, deceased, to me, as the executor under her will, to which I have just administered. Her shares will shortly have to be transferred to my sister, M. C. Keene." After the marriage of his sister, Mr. Keene wrote the following letter to the secretary: "Troubridge, January 27, 1843. Dear Sir, — I beg to inform you that my sister (in your books Miss Mary Cadby Keene) is now Mrs. Kluht; her address is, however, the same as before: Wall Cottage, Twickenham. Her shares, as well as those of my deceased sister, Lydia, will be transferred, I believe, when the legacy duty is paid, to Mrs. Kluht's husband, the Rev. H. B. Kluht, of which I will forward positive instructions as soon as I have paid the duty at Somerset House."

The secretary of the company, upon receiving this letter, wrote in pencil, against the entry relating to the shares in the share register book of the company, the name of "Kluht;" and subsequent circulars respecting the shares were sent to Mr. Kluht. A dividend, however, afterwards declared upon the shares, was paid in May, 1843, to Mr. Keene.

\* 276 In April, 1844, a resolution was passed at a meeting \* of the shareholders, that advances upon loan notes of the company should be made by the shareholders in proportion to their interest in the concern. The facts respecting this call are stated in *Morgan's Case*. (a) Mr. Keene, the executor, gave his acceptance to the company for 400*l.* to meet this call, being 330*l.* for an advance of 5*l.* per share in respect of shares held by himself, and 70*l.* in respect of the shares of Mr. and Mrs. Kluht, in which were included the above five shares. Mr. Keene on that occasion wrote to the secretary as follows: "Dear Sir, — I have inclosed you my acceptance as suggested for 400*l.*; but in doing so, I do not hold myself responsible for the amount of Mr. Kluht's advances, although aware he is not able to pay it himself. I send you, however, the acceptance to the joint amount, rather than occasion you any inconvenience." The bill was afterwards renewed, and ultimately returned to Mr. Keene, on payment of 330*l.* only in respect of his own shares. The balance of 70*l.* was never paid. Mr. Keene having died, the Master placed Mr. Wood, the surviving

(a) 1 De G. & S. 750; 1 M. & G. 225.

executor, on the list of contributories, without qualification in respect of the above five shares. The Vice-Chancellor, however, upon an appeal from the Master's decision, directed that the name of Mr. Wood should only remain on the list as liable up to the death of the testatrix.

*Mr. Russell* and *Mr. T. H. Terrell*, in support of the appeal. — There is not sufficient in this case to show either an assent to the legacy, or an approval by the company of Mr. and Mrs. Kluht, or either of them, as propriéters or \* proprietor of \* 277 the shares, or of any discharge by the company of the estate of the testatrix.

They cited *Morgan's Case*, (a) *Ex parte Gouthwaite*, (b) *Crosfield's Case* (c).

*Mr. Bacon* and *Mr. Roxburgh*, for the respondent. — The executor's assent is sufficiently proved by the letters of the 13th of August, 1842, and 27th of January, 1843, and the company must be bound by entries in their books; the entry by the secretary of Mr. Kluht's name in the ledger, at all events released the testatrix's estate from losses accruing after her death.

*Mr. Russell*, in reply.

THE LORD JUSTICE KNIGHT BRUCE. — *Prima facie* the estate of Miss Lydia Keene, who was a proprietor of five shares in this company at the time of her death, continues liable in respect of those five shares. It is upon those who assert that that liability has ceased, to prove it. It is said that the liability has ceased under the 38th and 44th sections or clauses of the deed, inasmuch as Miss Lydia Keene made a will by which, either as part of her residue or specifically, she bequeathed the shares in question to her sister. Her sister married a gentleman named Kluht after the testatrix's death, and it is said that the executors or one of them assented to the bequest, whether specific or residuary, and that the legatee or her husband was approved by the directors in a sufficient and binding \* manner as a proprietor, or that they \* 278 were both so approved as proprietors, in respect of these

(a) 1 De G. & S. 750; 1 M. & G. 225.

(b) 3 M. & G. 187.

(c) 2 De G. M. & G. 128.



shares from the death of the testatrix, in which case it is assumed, and probably with correctness, upon the deed, that the liability of the estate would cease. It is denied on the part of the official manager, that there was assent to the bequest.

It is denied also on his part that Mr. and Mrs. Kluht were approved, or that either of them was approved, as proprietors or as a proprietor of these shares in succession to the testatrix, and that consequently a case of discharge of the estate has not arisen.

Now the 38th clause provides that legatees may, with the approbation of the directors to be manifested as aftermentioned, but not otherwise, be admitted, and become proprietors of the company in respect of shares, and the 41st clause provides — [His Lordship read it]. It is plain and undisputed here that the things required to be done were not done, and that therefore, if the letter of the deed is to prevail, the responsibility has not ceased, and the Master's conclusion was the correct conclusion. But it is said that although the very things prescribed by the deed were not done that was done, which ought to be taken as equivalent, inasmuch as (it is also said that) the manner of proceeding in the administration of the affairs of this company was so loose, and departed so materially or so much from the language of the deed, that that course of proceeding ought to be taken as one adopted by the company, in substitution for the course required by the deed, and that therefore what was done was sufficient.

Unquestionably, in ordinary partnerships, any clause of \* 279 the deed, however strict or precise, may in practice \* be departed from or waived.<sup>1</sup> In a partnership, for instance, of two, or three, or four, where they alone are interested in the stipulations into which they have entered, as they were the persons who created the obligation, and are the only persons whom the obligation concerns, they are at liberty to depart from it, and it has often happened that on dissolutions and the winding-up of partnerships, the arrangements made have proceeded on a basis very different from that which the deed provided, the evidence being plain of a departure agreed to between those concerned in the matter, who were competent to agree to that departure. The same course, attended with the same results, is not absolutely

<sup>1</sup> Collyer Partn. (5th Am. ed.) §§ 210-212, and cases in notes; England v. Curling, 8 Beav. 129; McGraw v. Pulling, 1 Freem. Ch. (Miss.) 357; Solomon v. Solomon, 2 Kelly, 18; 1 Lindley Partn. (Eng. ed. 1860) 510 *et seq.*

impossible in the case of one of those extended partnerships called joint-stock companies, in which it being impossible for every partner usefully, or with propriety, to interfere directly or personally in the management of the business, its affairs are delegated to a chosen body, whether called a committee, or directors, or by any other name, acting as agents for the whole. But there is obviously much more difficulty in acting on the rule which I have just mentioned, in such a case; because, *prima facie*, the duty of an agent is to obey and follow his instructions. Directors and committees are not appointed to depart from the deed of constitution. They are appointed to carry it into effect. It is obvious, therefore, to repeat what I just now said, that though such a result in the case of a joint-stock company is not impossible, it is one much more difficult to be arrived at, and, in point of fact, much more rarely arrived at.

In the present instance, upon the best attention that I have been able to give to the evidence (I have heard, and I think I have understood the whole of it), the case appears to me to fail on two essential grounds. \*In the first place, how is it \* 280 shown that the body at large to be affected by proceedings of the present description did assent to a departure by the directors from this very rational provision in the deed, as to the manner of exhibiting the assent of the directors to the introduction of a new proprietor? The evidence appears to me wholly insufficient to authorize the arrival at such a conclusion. If, indeed, it had been shown that the body at large had so acted as to have made the directors their agents for such a purpose, probably they would have to abide the consequence; but, as I have already said, the evidence appears to me far, very far, short of warranting such a conclusion.

The observations that I have just made suppose that the directors themselves have concurred in the approval, and the admittance of the husband or the wife, or both, in respect of the five shares held by the testatrix. But even that does not appear to me shown. There is nothing in evidence, as the evidence strikes my mind, except the acts sufficiently loose in themselves of a gentleman acting as secretary of the company, and we do not find any proof associating the directors with him in those acts which are of importance in the case.

I am of opinion, therefore, that the proprietors at large in this company have a right to say that not only in form, but in sub-

stance also, those acts were not done by which alone the responsibility of the estate of the testatrix could be made to cease. That conclusion is supported by the remark, that no one can tell what manner of proprietorship it was that was accepted or approved, if any was accepted or approved, in lieu of the estate of the testatrix.

Whether it was Mr. Kluht alone, or Mr. and Mrs. Kluht \* 281 together, nowhere appears, \* as I understand the materials before the Court. It was, however, essential to show which of these things was intended to be done and was done.

For these reasons my impression is the same as the Master's upon this case.

THE LORD JUSTICE TURNER. — I concur in the opinion that has been expressed by my learned brother in this case. The deed of this company provides for the shares of legatees becoming vested in them under particular conditions and qualifications, and though there may be a course of conduct on the part of directors which (supposing there is sufficient to raise the inference that all the shareholders in the company have concurred), may dispense with the particular requisites of transfer required by a deed of settlement, it is, I think, beyond doubt, that here the approbation of the directors of the company being required by the deed to vest the shares in the legatee, such an approbation on their part must be shown for the purpose of discharging the testatrix's estate from liability. It is argued that there has been substantial approbation on the part of the directors of this company of the vesting of those shares in the legatee; and this argument rests, as I understand, on two grounds.

First, it is said that letters were written by the executor to the directors, or to the secretary of the company, in one of which the executor expressed himself to the effect that the shares of the legatee would have to be transferred to her; and in another of which, dated 7th January, 1843, it is said that the shares of that legatee would have to be transferred to her husband, Mr. Kluht, and that these letters are stated by the secretary of the company in \* 282 his affidavit to have been \* followed by an entry made by him in the books of the company in pencil writing, under the account of the shares in which this lady's name appeared before her marriage, the name of Kluht. Now whatever consideration might be due to this act of the secretary if it stood alone, there is

evidence before us showing that at a subsequent period in the month of May, 1843, the dividends of those shares were nevertheless, and notwithstanding the entry of the name of Kluht, paid to Keene the executor, and not to Kluht, the person to whom it is supposed the transfer had been made with the consent of the directors.

Secondly, it is said that subsequently to 1843, and in 1844, a transaction of this nature took place: it became necessary for the shareholders of this company each to advance 5*l.* on account of their respective shares for the purpose of assisting the company, and a bill was drawn by somebody on the part of the company and accepted by Mr. Keene for a sum of 400*l.* in respect of a contribution of 5*l.* per share, 400*l.* being the amount of contribution of 5*l.* a share on the shares held by Mr. Keene himself, and also in respect of the fourteen shares vested in Mr. Keene as executor. That bill, it appears, became due and was not paid, and ultimately Mr. Keene paid in a sum of 380*l.* only, the amount of contribution of 5*l.* per share on his own shares. But it has been already held in Mr. Kluht's case, that the circumstances connected with that bill did not make Mr. Kluht liable as husband of Mrs. Kluht; in respect of the shares which she held originally in her own right and if it did not make him liable as husband in respect of those shares, I do not see how it can make him liable as husband in respect of those of which she was legatee, and much less do I see how it could make Mrs. Kluht liable in any way in respect of those shares; and as it \* did not make Mr. Kluht liable \* 283 as husband, and did not make Mrs. Kluht liable as wife, the consequence was that there was no shareholder who could be liable except the executor of the testator, and I cannot conceive that the estate can be discharged except by the effectual substitution of some shareholder.

The Vice-Chancellor appears to have founded his judgment on the fact of assent of the executor. This, however, is not a case of specific bequest; and even assuming it to be capable of passing by assent, it is necessary here not merely that there should be assent on the part of the executor, but also approval on the part of the directors. In my opinion, the respondents have failed to establish a case of approval on the part of the directors.

The order will be that the official manager shall take his costs out of the estate, and that there shall be no costs on the other side.

1853. January 20. Before the LORDS JUSTICES.

Conditions of sale stated that an abstract of title would be furnished within seven days from the day of sale, on the application of the purchaser for the same, and provided that all objections should be taken within eight days of such delivery or be considered as waived. The purchaser's solicitor called for the abstract two days after the sale, but owing to the estate being in mortgage, and the mortgagee being abroad, the abstract was not delivered till thirteen days after the sale. The purchaser brought an action for the deposit. The vendor filed a bill for specific performance and an injunction: *Held*, on demurrer, that the time of the delivery of the abstract was not of the essence of the contract, the importance of stipulations as to time being differently regarded in Courts of Law and Equity.<sup>1</sup>

THIS was an appeal from the decision of the Master of the Rolls, overruling a demurrer to a bill for specific performance of an agreement for the sale of certain freehold ground-rents of 43*l.* 0*s.* 6*d.* per annum; which constituted part of the copartnership property of the plaintiffs. The following was the substance of the statements of the bill.

On the 22d of July, 1852, the plaintiffs put up the ground-rents for sale by public auction, together with other ground-rents, and certain cottage residences, according to certain printed particulars

<sup>1</sup> See *Tilley v. Thomas*, L. R. 3 Ch. Ap. 61; *Rose v. Calland*, 5 Ves. (Perkins's ed.) 186, 189, and cases in note (a); 2 Dan. Ch. Pr. (4th Am. ed.) 989 note (3) and cases cited; *Hepburn v. Auld*, 5 Cranch, 262, 275; *Finley v. Lynch*, 3 Bibb, 566; *Richmond v. Gray*, 3 Allen, 25; *Wynn v. Morgan*, 7 Ves. 202; *Hoggart v. Scott*, 1 R. & M. 293; 1 Sugden V. & P. (7th Am. ed.) 334 [283] *et seq.*; *Lloyd v. Collett*, 4 Bro. C. C. 469; S. C., 4 Ves. 689 and notes; *Walton v. Wilson*, 30 Miss. 576; *Ewing v. Crouse*, 6 Ind. 312; *Keller v. Fisher*, 7 Ind. 718; *Taylor v. Longworth*, 14 Peters, 172; S. C., 1 McLean, 375; *Crittenden v. Drury*, 4 Wis. 205; *Edgerton v. Peckham*, 11 Paige, 352; *Pinckney v. Hagerdon*, 1 Duer, 90; *Viele v. Troy and Boston R.R.*, 21 Barb. 381; *Remington v. Irwin*, 2 Harris, 143; *Tiernan v. Roland*, 3 Harris, 429; *Pratt v. Carroll*, 8 Cranch, 471; *Waters v. Travis*, 9 John. 450; *Brumfield v. Palmer*, 7 Blackf. 227; *Morgan v. Scott*, 2 Casey, 51; *Mayo v. Swope*, 8 Grattan, 46; *Seymour v. Delancy*, 3 Cowen, 445; *Cotton v. Ward*, 3 Monroe, 313; *Jones v. Robbins*, 29 Maine, 351; *Seton v. Slade*, 7 Ves. (Perkins's ed.) 265 n. (b); 2 Lead. Cas. in Eq. (3d Am. ed.) [429] 49 *et seq.* and the notes; *McMurray v. Spicer*, L. R. 5 Eq. 527; *Day v. Luhke*, L. R. 5 Eq. 336; *Webb v. Hughes*, L. R. 10 Eq. 281.

and conditions of sale, in three lots; and the freehold ground-rents were comprised in lot 1 of the printed particulars, and were described as follows: Lot 1. Freehold ground-rents of 43*l.* 0*s.* 6*d.* per annum, arising from nine houses, Nos. 1 to 9, Upper Mary Street, Bromley, in the county of Middlesex; Nos. 1, 2, and 3, let on leases, which expire at midsummer, 1925; and Nos. 4 to 9 on lease, which expires November 1st, 1891, as under; No. 1, at 2*l.* 13*s.* 6*d.* per annum; Nos. 2 and 3, at 5*l.* 7*s.* 0*d.* per annum; and Nos. 4 and 9, 35*l.* 0*s.* 0*d.* per annum; rack rental value about 135*l.* 0*s.* 0*d.* per annum.

The third condition of sale was as follows: "The purchaser shall, immediately after the sale, pay into the \* hands \* 285 of the auctioneers a deposit of 20*l.* per cent, in part of his or her purchase-money, and sign an agreement for payment of the remainder to the vendor, on or before the 8th August next, at which time the purchase is to be completed; but if such purchase is not completed on the said 8th August, the purchaser thereof, from whatever cause the delay shall arise or be occasioned, shall pay interest on the remainder of his purchase-money, at the rate of 5*l.* per cent per annum, from that day until the day of completing his or her purchase, without prejudice to the right reserved to the vendor by the last condition. The purchaser will be entitled to receive the rents as from the day of completing the purchase, or possession as the case may be."

The fourth condition was as follows: "In order to save expense, within seven days from the day of the sale, the vendor shall, at his own expense, on application of the same, make and deliver to the purchaser or his solicitor an abstract of title, commencing with a conveyance to the vendors, and on completion of the purchase, title-deeds of earlier date will be handed over to the purchasers, and no earlier title shall be required, and the purchaser shall make his or her objections, or requisitions (if any), in regard to the title, and cause the same to be delivered at the office of the vendor's solicitor within eight days from the receipt of his or her abstract; and all objections or requisitions which shall not be made within the time above specified shall be taken to be waived, and shall not, under any circumstances, be capable of being afterwards made or adduced; but in case any requisition or objection shall be so delivered, or made, and be such that the vendor's solicitor should consider it advisable to abandon the con-

tract, the vendor shall, on returning or tendering to the  
 \* 286 purchaser his or \* her deposit-money, be at liberty to rescind  
 the contract altogether, by a note in writing, under his or  
 her hand, without any further claim on the part of the purchaser  
 for interest, costs, expenses, or otherwise. Lots 1 and 2 are  
 comprised in one conveyance; the largest purchaser in amount  
 will be entitled to the custody thereof, who will covenant with the  
 other purchasers in the usual way for the production; and as to  
 lot 3 being part of a larger estate, the whole thereof being com-  
 prised in one conveyance, the purchaser shall have a conveyance  
 from the vendor, with the usual covenant, to produce the said con-  
 veyance, and any other document that may relate to this and other  
 portions of the estate. Lots 1 and 2 are sold, subject to a rent  
 charge, riding over this and other property, of very considerable  
 value; no objection shall be taken on this account, and no compen-  
 sation shall be made, and no evidence required, on what property  
 the said rent charge is made."

The defendant attended the sale, and was the highest bidder for  
 lot 1, and he was declared and became the purchaser of the free-  
 hold ground-rents comprised in lot 1 for the sum of 800*l.*, and  
 paid to the plaintiffs his deposit of 160*l.* on the purchase-money,  
 and signed an agreement, bearing date the 22d of July, 1852, for  
 the purchase of the ground-rents and for the payment of the  
 remainder of the purchase-money, according to the third condition.

The second and third lots were not sold at the auction, and  
 some negotiation took place between the defendant and the plain-  
 tiffs relative to the purchase of lot 2, which, however, went off.  
 Pending such negotiation, Mr. Farnell, the solicitor of the defend-  
 ant, by letter, dated the 24th of July, 1852, called upon  
 \* 287 the plaintiffs to send to \* him an abstract of the title of the  
 freehold ground-rents, with a copy of the contract.

The title-deeds were in the possession of a mortgagee, and the  
 plaintiffs immediately applied to the solicitors of such mortgagee  
 and requested them to furnish the abstract of title to Mr. Farnell,  
 but owing to the absence of the mortgagee on the continent, the  
 abstract could not be at once furnished.

On the 3d of August, 1852, Messrs. Finch & Shephard, the so-  
 licitors of the mortgagee and of the plaintiffs, sent an abstract to  
 Mr. Farnell, with a copy of the contract, and a letter from Messrs.  
 Finch and Shephard to Mr. Farnell, dated the 2d of August, 1852,

stating that the abstract could be examined with the deeds at any time Mr. Farnell might appoint.

Mr. Farnell received the abstract, letter, and copy of contract some time in the course of the day of the 3d of August, 1852.

Shortly afterwards the plaintiffs received from Mr. Farnell a letter, dated the 3d of August, 1852, which (so far as material) was as follows: "Not having received the abstract of title to the lot purchased by Mr. Berry, agreeably to the conditions, I presume there is some difficulty regarding the title. I will therefore thank you to return me the deposit of 160*l.* paid by my client, and I do hereby rescind the contract on his behalf."

On the 5th of August, Messrs. Finch & Shepherd received a letter from Mr. Farnell, dated August, 1852, but without specifying any precise day, which, so far as is material, was as follows: "I beg to acknowledge the \* receipt to-day of \* 288 abstract of title to freehold premises at Bromley, Middlesex, purchased by my client, Mr. John Robert Berry, at auction, on the 22d July last, and to refer you to my letter of yesterday, addressed to the auctioneers, Messrs. Roberts & Roby, rescinding the contract on the part of Mr. Berry, for the reason therein stated. The abstract shall be returned as you may direct."

The defendant refused to perform the agreement, and had commenced an action for the recovery of the 160*l.*

The prayer was for specific performance of the contract, and an injunction to restrain further proceedings in the action.

*Mr. Roundell Palmer* and *Mr. J. H. Palmer*, in support of the appeal. — The case falls within a recent decision of the present Lord Chancellor when a Vice-Chancellor, *Parkin v. Thorold*, (a) where his Lordship had held that there was no difference between the construction which was to be put upon agreements in Courts of Equity and Courts of Law, and that in both the parties are held bound by contract according to its terms, including that respecting the time of its performance, unless there was any circumstance rendering it inequitable to enforce the term as to time on the ground of waiver or otherwise. [THE LORD JUSTICE KNIGHT BRUCE. — Was the case of *Lennon v. Napper*, (b) before Lord REDESDALE, cited in this case or in *Parkin v. Thorold*?] It does

(a) 2 Sim. N. S. 1.

(b) 2 Sch. & Lef. 684.



not appear to have been. [THE LORD JUSTICE KNIGHT  
 \* 289 BRUCE. — \* In that case Lord REDESDALE, who was a considerable master of equity jurisprudence, thus states the law upon this subject with perspicuity and precision: "The Courts, in all cases of contracts for estates in land, have been in the habit of relieving, where the party from his own neglect had suffered a lapse of time, and from that, or other circumstances, could not maintain an action to recover damages at law, and even where nothing exists to prevent his suing at law, so many things are necessary to enable him to recover at law, that the formalities alone render it very inconvenient and hazardous so to proceed: nor could, in many cases, the legal remedy be adequate to the demands of justice. Courts of Equity have therefore enforced contracts specifically, where no action for damages could be maintained; for at law the party plaintiff must have strictly performed his part,<sup>1</sup> and the inconvenience of insisting upon that, in all cases, was sufficient to require the interference of Courts of Equity. They dispense with that which would make compliance with what the law requires oppressive; and in various cases of such contracts, they are in the constant habit of relieving the man who has acted fairly, though negligently. Thus in the case of an estate sold by auction, there is a condition to forfeit the deposit if the purchase be not completed within a certain time; yet the Court is in the constant habit of relieving against the lapse of time: and so in the case of mortgages, and in many instances, relief is given against mere lapse of time where lapse of time is not essential to the substance of the contract." His Lordship also referred to *Seton v. Slade*. (a)] We submit that the observation of Lord CRANWORTH, that there ought not to be two different constructions of the same contract in different courts, is unanswerable.  
 \* 290 [THE \* LORD JUSTICE KNIGHT BRUCE. — Have there been two different constructions? Courts of Equity judge of the materiality of stipulations as to time differently from Courts of Law. Otherwise, how could there be a decree for the redemption of a

(a) 7 Ves. 265.

<sup>1</sup> See *Berry v. Young*, 2 Esp. Cas. 640, n.; *Hill v. Millburn*, 17 Maine, 316, 322; *Allen v. Cooper*, 22 Maine, 133; *Norris v. Winsor*, 12 Maine, 293; *Wiswall v. McGown*, 2 Barb. 270; *Shaw v. Wilkins*, 8 Humph. 647; *Shuffleton v. Jenkins*, 1 Morris, 427; *Chitty Contr.* (10th Am. ed.) 336; *Sitzell v. Kopp*, 9 W. & Serg. 29.

mortgage?] In all cases it will be found to have turned on the circumstances and nature of the case. In the case of a mortgage it would be inequitable to allow a forfeiture of the estate, because the contract is in all cases for security, and not for a conditional sale.

*Mr. Teed* and *Mr. Hislop Clarke*, for the plaintiffs, were not called upon.

THE LORD JUSTICE KNIGHT BRUCE. — It may perhaps be sufficient to dispose of this demurrer to say that the point is fitter to be decided at the hearing than at this time, as was said in *Brown-sword v. Edwards*. (a) I will, however, put that consideration aside, and then the question is whether, if the case were brought to a hearing, and the facts stated in this bill were either proved or admitted, and there were no other evidence, and nothing in the answer to vary the plaintiff's case, specific performance would be decreed. I am of opinion that it would. There is nothing on the face of the contract to show a strict attention to time to be of importance; and I apprehend that, when from the contract, or from the nature of the case, time is not shown to be of the essence of the contract, Courts of Equity have long been in the habit of relieving against mere lapse of time where it has been consistent with the substance of justice to do so. I could not express the rule better than by referring to the language of Lord REDESDALE in *Lennon v. Napper*. The defendant may \* be able to show the exist- \* 291  
ence of circumstances such as to make time essential or material, and it is quite consistent with the decision of the Master of the Rolls that upon the answer of the defendant, and evidence, the bill may be dismissed, especially as a time is limited within which the purchaser is to state his objections to the title. This stipulation may be of importance with regard to the question before us; but it may be that if the vendor does not abide by his stipulation as to the time of delivering the abstract, the purchaser may not be bound to abide by his. It appears to me that, as the Court has nothing before it but the bill, and is bound to treat the statements of the bill as admitted and as not being met by any additional fact, this must at present be treated as a case for specific performance. I agree in the conclusion of the learned Judge, the

Master of the Rolls, which, I repeat, is perfectly consistent with a case being made at the hearing for dismissing the bill with costs.

THE LORD JUSTICE TURNER. — One allegation in the bill is sufficient to dispose of the demurrer, — that which states the delivery of the abstract to have been prevented by the accidental absence of the mortgagee on the continent. This allegation makes a case for relief on the ground of accident. I do not, however, shrink from saying that my opinion coincides with that of the Lord Justice KNIGHT BRUCE. Time may be made to be of the essence of a contract, by express stipulation between the parties, by the nature of the property, or by surrounding circumstances, showing the intention of the parties that the contract was to be completed within a limited time.<sup>1</sup> The question here is, whether in the absence of any of these circumstances time is to be considered of the essence of the contract. I have always considered that

\* 292 \* the Court looks at the substance, and not at the mere form of a contract. In order to give legal rights it is necessary that some time should be specified at which the contract is to be completed ; but this Court looks at such a stipulation as being merely intended to create a legal right, and not to determine the substance of the contract, or any thing beyond the mere legal right. The time for the completion of the title, and of the conveyance from the vendor to the purchaser, may be made essential either by an express stipulation originally entered into, or, where the vendor is guilty of delay, by notice on the part of the vendor that he requires the contract to be completed within a limited time. A mere statement, however, in the conditions of sale that the abstract will be delivered on or before a particular day, is not, as it appears to me, sufficient to render the time of its delivery of the essence of the contract.

Appeal dismissed.

<sup>1</sup> This statement of the law was approved by Lord CAIRNS and Sir JOHN ROLT, L. J., in *Tilley v. Thomas*, L. R. 3 Ch. Ap. 61, in which it was held that where a contract for purchase provides that possession shall be given by a certain day, the word "possession" must be understood to mean possession with a good title shown. This construction is the same in equity as at law, although a Court of Equity will consider time not to be of the essence of the contract, and will relieve against a breach of performance at the date assigned, unless there is something in the contract, the nature of the property, or the circumstances, which renders it inequitable for the Court to interfere.

\* THORNTON v. COURT.

\* 293

1853. January 13, 19. 1854. January 23. Before the LORDS JUSTICES.

A mortgagee cannot effectually, in equity, without the concurrence of the mortgagor, release a vendor, from whom the mortgagor purchased, from his covenant for quiet enjoyment.<sup>1</sup>

Therefore, where A. conveyed to B. with a covenant for quiet enjoyment, and B. conveyed the estate to C., by way of mortgage, and, on B. being evicted, A., without the concurrence of B., paid to C. a sum of money in discharge of the covenant, it was held that the transaction was not binding on B.; and A. was, at the suit of B., restrained from setting up the conveyance to C., or the accord between A. and C., as a defence to an action by B. on the covenant.<sup>2</sup>

THIS was an appeal from the decree of the Master of the Rolls dismissing the appellant's bill. In April, 1842, the respondent, William Court, sold to the appellant, Ralph Thornton, a piece of land at Whitegate, in the county of Chester, for 180*l.*, and conveyed it to the appellant by a deed, which contained the following covenant:—

“ And the said William Court doth hereby for himself, his heirs, executors, and administrators, covenant, promise, and agree, that he the said Ralph Thornton, his heirs and assigns, shall and may, from time to time, and at all times hereafter, peaceably and quietly have, hold, use, occupy, possess, and enjoy the said hereditaments and premises mentioned to be hereby granted and released, and receive and take the rents, issues, and profits thereof to and for his and their own use and benefit without the let, suit, hindrance, interruption, or denial of the said William Court, his heirs or assigns, or of any person or persons whomsoever, and that free and clear, and freely and clearly acquitted, exonerated, and discharged, or otherwise, by the said William Court, and his heirs well and sufficiently saved harmless and kept indemnified of, from, and against all and all manner of former and other gifts, grants, bargains, leases, mortgages, surrenders, forfeitures, rents, arrears

<sup>1</sup> See Rawle Cov. for Title (3d ed.) 360, 361, 365, 377–379; *McGoodwin v. Stephenson*, 11 B. Mon. 22.

<sup>2</sup> See Rawle Cov. for Title (3d ed.), 376, 377, and cases referred to; *Phillips v. Clagett*, 11 M. & W. 84.

of rent, dower, statutes, judgments, executions, extents, titles, charges, and incumbrances whatsoever, made, done, com-

\* 294 mitted, or executed \* by the said William Court, or any other person or persons whomsoever."

On the 25th of April, 1842, the appellant mortgaged the land in fee to Samuel Bolshaw for 200*l*. Immediately after the 9th of April, 1842, the appellant entered into possession of the land, and remained in possession till he was evicted, as will be presently stated, and he expended sums in improvements amounting to upwards of 150*l*.

In July, 1846, Lord Delamere and his trustee, Mr. C. W. W. Wynn, commenced an action of ejectment against the appellant, who pleaded the general issue.

The action was tried in April, 1847, when it was proved that a testator, under whose will the respondent's title was deduced, had conveyed the land to Lord Delamere and his trustee, who thereupon obtained a verdict and judgment, with costs taxed at 143*l*. The appellant gave up possession to Lord Delamere.

In June, 1847, the appellant brought an action against the respondent upon the covenant for quiet enjoyment, to which the respondent pleaded, 1st, that Lord Delamere had not, at the time of the eviction, any title to the land; 2d, that, after the making of the covenant and before the eviction, the plaintiff had conveyed the land to Bolshaw, and had not any estate therein at the time of his eviction. In consequence of the plea of the conveyance to Bolshaw, the appellant had not proceeded with the action.

In October, 1847, the respondent paid to Mr. Bolshaw 220*l*. \* 295 in satisfaction of his mortgage, and obtained from \* him the mortgage deed, with a memorandum indorsed upon it and signed by him in the following terms:—

"Memorandum, that I have this day received from William Court, of the Manor, near Middlewick, in the county of Chester, Esq., the sum of 220*l*., being in full satisfaction and discharge of all principal money and interest secured by the within deed, and also in full satisfaction and discharge of all rights of action which I might or could have against the said William Court, by virtue of or under the covenants of the said William Court, contained in a certain indenture, bearing date the 9th day of April, 1842,

and made between the said William Court of the one part and Ralph Thornton of the other part; and I undertake that I, my heirs, executors, and administrators, shall on the demand and at the expense of the said William Court, his heirs, executors, or administrators, execute such release, transfer, or other assurance, as the counsel of the said William Court, his heirs, executors, or administrators shall advise and require. Witness my hand the 14th day of October, 1847. SAMUEL BOLSHAW."

In March, 1851, the appellant filed his bill in the present suit against the respondent, praying that it might be referred to the Master to assess the amount of loss and damage sustained by the appellant, and to which he was still liable, in consequence of the breach of the respondent's covenant for quiet enjoyment, and that an account might be taken of the money paid by the respondent to the mortgagee in satisfaction of the mortgage debt and interest, and that all necessary directions might be given for enabling the Master to make such assessment and take such account, the appellant submitting to allow the respondent such sums as should appear to have been paid by him, and 70*l.*,

\* the purchase-money for a part of the property which the \* 296 appellant had resold at that price.

*Mr. Roundell Palmer* and *Mr. J. Nicholson*, in support of the appeal. — The object of the bill is to recover compensation by way of damages for the breach of a covenant for quiet enjoyment. This is a proper case for equitable relief. *Ranelagh v. Hayes*. (a) The plaintiff's remedy at law was defeated by a dealing between the defendant and the mortgagee, which may be effectually set up at law as accord and satisfaction, but which was contrary to the duty of the mortgagee, and is fraudulent and void in equity. Even if the defendants were restrained from setting up the memorandum, an action brought in the name of the mortgagee would be an inadequate remedy, because the mortgagee (the nominal plaintiff) could not allege in his declaration, and therefore could not prove that he had been put to any costs in defending the action of ejectment to which he was no party. The plaintiff, however, is entitled to such costs, and would have recovered them at law if he could

(a) 1 Vern. 189.

have sued in his own name. *Smith v. Compton.* (a) The plaintiff is also entitled to recover for agricultural improvements. *Lewis v. Campbell,* (b) *Edwards v. M'Leay.* (c)

*Mr. Lloyd, Mr. Twells, and Mr. Beavan, for the defendant. —*

The bill seeks a remedy in this Court for the breach  
 \* 297 \* of a covenant, for which there is a remedy at law. Such a bill cannot be sustained. *Todd v. Gee,* (d) *Sainsbury v. Jones.* (e) The cases of *Denton v. Stewart* (g) and *Greenaway v. Adams,* (h) which may be cited, were overruled by *Todd v. Gee.* Moreover, when the appellant made the mortgage, the right to sue upon the covenant passed by the conveyance to the mortgagee, and the covenantor was justified in discharging to him the obligation under the covenant. If the respondent had not pleaded the mortgage, he might have had to pay twice over, once to the mortgagor and once to the mortgagee. The mortgagee had, by means of the conveyance to him, full power to deal with the land as legal owner, in the same way as he might receive rent from a tenant. If, independently of fraud, which is not alleged on this record, or proved, he has damaged the mortgaged property by an improvident bargain, with respect to the covenant, the mortgagor's remedy is against him. At all events, without his being a party, the mortgagor cannot sue the person with whom the bargain was made. The respondent is entitled to be repaid the mortgage money, with interest from the date of the mortgage. On the other hand, the appellant cannot charge against him the costs of the action of ejectment, unless he could prove (which he cannot) that the respondent was consulted, and approved of the defence. *Dryden v. Frost,* (i) *Lord Portarlington v. Graham,* (k) and *Williams v. Burrell,* (l) [THE LORD JUSTICE KNIGHT BRUCE. —  
 Was there a covenant in that case?] *Gillet v. Rippon.* (m)  
 \* 298 Nor could he at law, nor can he, therefore, \* here recover in respect of improvements. The value of the land at the

(a) 3 B. & Ad. 407.

(b) 8 Taunt. 715; affirmed in error, 3 B. & Ald. 392.

(c) 2 Swan. 287.

(i) 3 M. & C. 670.

(d) 17 Ves. 273.

(k) 5 Sim. 416.

(e) 2 Beav. 462; 5 M. & C. 1.

(l) 1 Com. B. 402.

(g) 17 Ves. 276, n.

(m) Moo. & M. 406.

(h) 12 Ves. 395

time of the conveyance is that which regulates the amount of damages.

THE LORD JUSTICE KNIGHT BRUCE. — The defendant in this case entered into a covenant for the peaceable enjoyment of an estate, which he sold to the plaintiff, who, having paid his money for the purchase and entered into possession, mortgaged the property, as he was entitled to do, so parting with his legal estate, if any, and with his legal power, but retaining a title to redeem the property, and reinstate himself in his original right. In this state of things, an adverse claim under a title paramount to each of them was asserted, and the plaintiff, being in possession, defended himself at law, but unsuccessfully, for the paramount claim succeeded, and the plaintiff was evicted. No man, therefore, could doubt the right of the plaintiff to obtain in some manner substantial damages against the covenantor, whose covenant had thus been broken. The defendant, the covenantor, being aware of this, applied to the mortgagee, in whom was of course the whole right at law to sue, and paid him off, acquiring thereby the rights that the mortgagee had. He took at the same time an acknowledgment from the mortgagee that the payment was in full of all demands upon the covenant, thereby, perhaps, creating (though it is not necessary to decide the point), a case of accord and satisfaction, and rendering it impossible for him ever to be sued at law on the covenant. The plaintiff, therefore, thus embarrassed by the act of the defendant, now comes to this Court asking (whether in a perfect form is a matter unimportant) for an opportunity of assessing the damages either here or in a Court of Law, which he would plainly have had a right to assess in a Court of Law, but for the mortgage.

\* If that is the true view of the case, as I believe it to be, \* 299 there is only one course to be taken. It is the right of the mortgagee, or of the person to whom the mortgage has been transferred, to have the money advanced repaid with interest; but there must also be ascertained the amount of damages which the plaintiff has sustained by the loss of the estate. We think that this cannot properly be ascertained here without the consent of both parties to the litigation. And, perhaps even with the consent of both, we might not improperly decline to take upon ourselves such a jurisdiction. But in order to save expense, we are ready,



at the request of both parties, to undertake it. Unless they concur in such a request, there must be an action to ascertain the true amount of damages; and I suppose that the best mode of enabling that to be done, will be to allow the plaintiff, within a limited time, to bring such action as he may be advised against the defendant, and to restrain the defendant from setting up the deed of mortgage executed by the plaintiff: the matter to be brought on again in this Court when judgment shall have been obtained, and execution not to issue without leave of this Court.

**THE LORD JUSTICE TURNER.**—The facts of this case lie in a narrow compass. In 1842 the defendant conveyed a piece of land to the plaintiff, in consideration of 180*l*. On the 25th of April, 1842, the plaintiff mortgaged to Mr. Bolshaw for 200*l*. In 1847, Lord Delamere recovered in ejectment against the plaintiff, and costs were incurred by the plaintiff, who had also to pay Lord Delamere's costs.

In October, 1847, the defendant Court paid Bolshaw \* 800. \* the amount due on his mortgage, and took an acknowledgment in full of all damages under the covenant.

In the first place, the question arises, had Bolshaw a right, as between himself and the plaintiff, so to deal with the rights of the plaintiff under the covenant? I am of opinion that he had not. Bolshaw, as mortgagee, was charged with this duty: on payment of the mortgage money, he was bound to reconvey to the plaintiff, and give him the benefit of the covenant. Therefore the acknowledgment of satisfaction of the covenant was a breach of the duty which Bolshaw owed to the plaintiff, and in fact amounted to a sale by Bolshaw to Court of the benefit of the covenant, which he had no authority to make. As he was not authorized to make it, it was not binding on the plaintiff.

It was contended to be necessary in this case that fraud as between Bolshaw and Court should be alleged and proved. But it being clear that Bolshaw has exceeded his authority, I think that is quite sufficient, without showing fraud. It is said that no damage has been sustained; that, however, is the question which will have to be decided in the action, and I concur with my learned brother in thinking the plaintiff entitled to have it so decided.

The following was the order:—

[ 284 ]

The plaintiff by his counsel undertaking to bring such action as he shall be advised in his own name against the defendant, on the covenant for quiet enjoyment in the pleadings mentioned, and undertaking to deliver a declaration in such action within three weeks \* from the date of this order, and to proceed \* 301 to trial at Chester in such action with due diligence, their Lordships do order that the defendant be restrained from setting up by pleading, or giving in evidence, the mortgage executed by the plaintiff, or the memorandum in the pleadings mentioned. Execution was directed not to issue without the leave of the Court, and further directions and costs were reserved, with liberty to apply.

An action at law was accordingly brought, when the jury assessed the damages at 302*l.* Cross rules were obtained to increase and diminish the amount; by consent the damages were reduced to 252*l.*, so that, deducting 220*l.*, the amount paid by the defendant to Bolshaw (which was not disputed), 32*l.* only remained due to the plaintiff.

1854. January 28.

The case now came on, on further directions.

*Mr. R. Palmer* and *Mr. Nicholson*, for the plaintiff.

*Mr. Lloyd* and *Mr. Beavan*, for the defendant. — Interest must be allowed to the defendant upon the mortgage debt which he paid off to Bolshaw, from the date of the mortgage to the time of the payment, and this will turn the balance in favour of the defendant, and entitle him to his costs. The defendant's two characters \* must be separated. The judgment at law \* 302 speaks as of its date, so that in Michaelmas, 1853, Court on his covenant was indebted in 252*l.* On the other hand, Court paid off Bolshaw's mortgage five years back, and, standing in Bolshaw's place, is entitled to five years' interest. On that footing 275*l.* will be due to him, leaving a balance in his favour of 23*l.*

*Mr. R. Palmer*, in reply. — The Judge at the trial held, that the plaintiff was not entitled to interest on his purchase-money, and by the defendant's improper conduct, he has therefore lost five years'

interest on that amount. If so, the defendant on the other hand cannot be allowed interest on the mortgage.

THE LORD JUSTICE KNIGHT BRUCE. — The defendant sustains two clearly distinct characters. In his character of covenantor he has committed a breach of his covenant entitling the covenantee to damages, and he has acted in a manner contrary to equity and good conscience, so as to render a suit here necessary for the purpose of removing a formal impediment which he had improperly set up at law as a bar to the remedy of the covenantee. In that respect he must be dealt with accordingly. But there having been a mortgage created by the plaintiff, in respect of which the plaintiff was indebted, the amount due upon the mortgage was paid by the defendant, and in an ordinary case he would be entitled to the benefit of the ordinary rights arising out of that state of circumstances. If, however, the legal impediment to which I have referred had not been interposed, the amount due upon the mortgage would long since have been annihilated

\* 303 by \* the compensation which would have been (as it has now been) awarded in respect of the breach of covenant. That consequence was prevented by the conduct of the defendant, and we are now asked to allow him interest in respect of a delay arising from his own wrong. I think that the claim urged by *Mr. Beavan*, with great propriety and ability, cannot be maintained. If the result of the account leaves the plaintiff in possession of any part of the damages recovered by him, the costs of the action must take their course at law. As the suit here has been occasioned altogether by the improper act of the defendant, he must pay the costs of it, except those of the appeal.

The Lord Justice TURNER concurred.

[ 236 ]

\* ATTORNEY-GENERAL v. The SHEFFIELD GAS \* 304  
CONSUMERS COMPANY.<sup>1</sup>

1852. August 6. Before the Lords Justices Sir J. L. KNIGHT BRUCE and Lord CRANWORTH.

1853. January 12, February 1. Before the Lords Justices Sir J. L. KNIGHT BRUCE and Sir G. TURNER. February 8, 16. Before the Lord Chancellor Lord CRANWORTH, and the Lords Justices Sir J. L. KNIGHT BRUCE and Sir G. TURNER.

The disturbance of the pavement in a town by an unincorporated gas company, for the purpose of laying down gas-pipes, *held*, by the Lord Chancellor and Lord Justice TURNER (*dissentiente* Lord Justice KNIGHT BRUCE), not to be such a nuisance as to be a sufficient ground for an injunction, either upon a bill or upon an information.<sup>2</sup>

Principles upon which the Court proceeds in restraining nuisances with regard to their extent and frequency.<sup>3</sup>

<sup>1</sup> S. C., 17 Jur. 677; 22 L. J. Ch. 811.

<sup>2</sup> This case was followed in *Attorney-General v. Cambridge Consumers Gas Co.*, L. R. 4 Ch. Ap. 71; 17 W. R. 145, reversing the decision of Sir R. MALINS, V. C., in S. C., L. R. 6 Eq. 282. It was cited and acted upon by Sir W. PAGE WOOD in *Cooke v. Forbes*, L. R. 5 Eq. 166, 173, 174; and it was recognized, and the principle of it restated, by Lord CRANWORTH in *Broadbent v. Imperial Gas Co.*, 7 De G., M. & G. 461, 462; S. C., 7 H. L. Cas. 600; 5 Jur. N. S. 1319; 3 Jur. N. S. 221.

<sup>3</sup> See *Soltau v. De Held*, 2 Sim. N. S. 183; *Cooke v. Forbes*, L. R. 5 Eq. 166; *Attorney-General v. Cambridge Consumers Gas Co.*, L. R. 4 Ch. Ap. 71, 80, 81; 2 Dan. Ch. Pr. (4th Am. ed.) 1637, and cases in note (5); 2 Story Eq. Jur. § 925; *Attorney-General v. Gee*, L. R. 10 Eq. 181. The real question in all the cases is one of fact: whether the annoyance or inconvenience is such as materially to interfere with the ordinary comfort of human existence; or, in reference to property, whether the injury arising from the matters complained of is such as visibly to diminish the value of the property, and the comfort and enjoyment of it. *St. Helen's Smelting Company v. Tipping*, 11 H. L. Cas. 642; S. C., 4 B. & S. 608, 616, 1093; *Walter v. Selfe*, 4 De G. & Sm. 322; *Crump v. Lambert*, L. R. 3 Eq. 409, 412, 413; *Ross v. Butler*, 4 C. E. Green (N. J.), 294; *Fish v. Dodge*, 4 Denio, 311; *Peck v. Elder*, 3 Sandf. 126; *Catlin v. Valentine*, 9 Paige, 575; *Wesson v. Washburn Iron Co.*, 13 Allen, 95; *Barnes v. Hathorn*, 54 Maine, 124; *Rhodes v. Dunbar*, 7 Am. Law Reg. N. S. 412; *Davidson v. Isham*, 1 Stockt. (N. J.) 207; *Walcott v. Melick*, 3 Stockt. 207; *Beardmore v. Leadwell*, 3 Giff. 683; *Inchbald v. Barrington*, L. R. 4 Ch. Ap. 388, 396; *Walker v. Brewster*, L. R. 5 Eq. 25; *Attorney-General v. Birmingham*, 4 K. & J. 528; *Attorney-General v. Earl of Lonsdale*, L. R., 7 Eq. 387; *Attorney-General v. Mid-Kent Railway Company and South-Eastern Railway Co.*, L. R. 3 Ch. Ap. 100.

Laches may be a defence to an application for an injunction by way of information as well as upon a bill.<sup>1</sup>

Effect of a protest in negativing laches.

Although the motives with which a suit is instituted are not generally to be regarded, they are not wholly immaterial when the complaint is of an alleged public injury.

The views of the majority of the inhabitants of a town, and of their governing body, are not without weight on such questions as the above.<sup>2</sup>

It is not enough to show a nuisance to constitute a case for an injunction;<sup>3</sup> but if it is a continuing nuisance the Court will not refuse an injunction because the actual damage arising from it is slight.<sup>4</sup>

THIS was a suit by information and bill, and it now came on upon a motion by way of appeal from the decision of Vice-Chancellor TURNER, refusing to grant an injunction which had been applied for by the relators and plaintiffs, the United Gaslight Company at Sheffield, to restrain the defendants from laying down any gas mains, pipes, or works, in or under the streets or highways in the borough of Sheffield, and from breaking up or disturbing for that purpose any road or highway, or from doing any other act whereby the passage of her Majesty's subjects along such highways or any of them might be obstructed or rendered less safe or convenient, or whereby the gas mains, pipes, and works of the plaintiffs might be interfered with. The facts of the case as detailed in the Vice-Chancellor's judgment were as follows:—

<sup>1</sup> As to the effect of delay or acquiescence in preventing the interference of the Court for or against a party in regard to restraining a nuisance, see *Bankart v. Houghton*, 27 Beav. 425, 528; *Senior v. Pawson*, L. R. 8 Eq. 330; *Buxton v. James*, 5 De G. & S. 80; *Attorney-General v. Eastlake*, 11 Hare, 205, 228; *Pillow v. Thompson*, 20 Texas, 206; *Tash v. Adams*, 10 Cush. 252; *Fuller v. Melrose*, 1 Allen, 166; *Bassett v. Company*, 47 N. H. 426; *Peabody v. Flint*, 6 Allen, 52, 57; 2 Dan. Ch. Pr. (4th Am. ed.) 1639, 1640, 1663, and cases cited in note (6); *Attorney-General v. Lunatic Asylum*, L. R. 4 Ch. Ap. 146; 17 W. R. 240.

<sup>2</sup> See *Attorney-General v. Cambridge Consumers Gas Co.*, L. R. 4 Ch. Ap. 71.

<sup>3</sup> See *Broadbent v. Imperial Gas Co.*, 7 De G., M. & G. 461, 462, where it was said by Lord CRANWORTH, L. C., 6, referring to the principal case, "It is quite clear the judgment of this Court proceeded upon the assumption that there was a nuisance, though it would not interfere by injunction where the evil was so infinitesimal to the persons complaining." S. C., 7 H. L. Cas. 600; 5 Jur. N. S. 1319; 3 Jur. N. S. 221.

<sup>4</sup> See *per* Sir W. PAGE WOOD, L. J., in *Attorney-General v. Cambridge Consumers Gas Co.*, L. R. 4 Ch. Ap. 80, 81; *Soltau v. De Held*, 2 Sim. N. S. 133; Lord CRANWORTH in *Broadbent v. Imperial Gas Co.*, 7 De G., M. & G. 462, 463.

There were formerly two gas companies in Sheffield, each company being incorporated under an Act of \* Parliament, \* 305 and each Act of Parliament gives power to break up the pavements with special provisions for compensation in respect of the damages occasioned by that proceeding. And the Act of the second company provided for the pavements not being broken up except on notice to the first company. There is also a water company in Sheffield, with similar provisions respecting the breaking up of the pavements, and compensation for the damages occasioned by it.

In the year 1844 an Act of Parliament passed, by which the two gas companies in Sheffield were united into one called the United Gas Company, who were the plaintiffs in the present suit.

In addition to the special Acts as to these two gas companies, the general Act of Parliament, (a) applicable to all gas companies obtaining parliamentary powers, contains special provisions as to breaking up the pavements, repairing, and restoring them.

In the autumn of 1851, the defendant's company, the Sheffield Gas Consumers Company, was projected. Soon afterwards a clerk of the plaintiffs, the United Gas Company, took occasion publicly to state that the highway board had no authority to permit the defendants to break up the pavements. The defendants on this published a handbill, in which they insisted that the highway board had such authority. The United Company thereupon, on the 28th of November, 1851, published a counter handbill, stating that the defendants, if they did proceed to break up the pavements, would be liable to indictment, and to the interference of this Court by injunction. The defendants, however, \* went \* 306 on with their company, and on the 10th of February, 1852, the company was completely registered. The deed of the company was registered on the 13th of March, 1852. On the 22d of March, 1852, the plaintiffs obtained a copy of it. The deed purported to confer powers on the directors of the Sheffield Gas Consumers Company to indemnify the authorities against any indictments, actions, or suits, which might be consequent on the proceedings of the company. On the 6th of April, 1852, the directors of the Gas Consumers Company made a report, by which they stated that they had authority from the parish boards to break up the pave-

ments, and that the surveyors of the highways were favourable to the objects of the company.

In this state of circumstance on the 17th of April, 1852, a bill was filed by the United Gas Company against the Gas Consumers Company, for an injunction similar to the injunction which was asked by the present information and bill. A motion was made for an injunction accordingly before Vice-Chancellor TURNER, on the 24th of May, 1852, and was refused.

On the 11th of June, 1852, the plaintiffs gave notice to the surveyors of the highways not to sanction the breaking up of the pavements. There are several boards and surveyors of highways in Sheffield; some of these boards returned answers to the notices, others of them returned no answers. The answers which were returned were not satisfactory. In this state of circumstances, on the 16th of July, 1852, the present information and bill was filed.

The case made by the information and bill was, that the defendants, the Gas Consumers Company, had no legal \* 307 authority to break up the pavements; that \* proceedings on their part would be attended with great injury to the highways, from the laying down of the pipes, and from the continually recurring necessity of taking up the pavements for the purpose of remedying any defects which there might be in the mains or pipes which might be laid by the company.

*Mr. Rolt and Mr. Amphlett*, in support of the appeal. — There is no doubt of the jurisdiction of the Court to restrain a nuisance, and that this is a nuisance of a lasting kind, and one likely to be of constant recurrence, is equally clear. It is therefore a proper subject for an injunction. If there was a legal question of any difficulty, the Court might withhold its interference until the decision of a Court of Law had been obtained in an action or otherwise. But no one can for a moment doubt that what has been done, and what is necessarily in contemplation, amount to a nuisance, which must be the subject of an indictment. The decision of a Court of Law would therefore be useless. With regard to private injury, it must be observed that the plaintiffs are, by their Act of Parliament, obliged to keep the streets in repair, and that this obligation will be rendered much more burthensome by the constant operations of the defendants. Moreover, it is impossible for two parallel lines of gas-pipes, and the operations requisite for each of them, to

exist without interfering materially with each other; and it would be very hard upon the plaintiffs, who, in order to obtain liberty to interfere with public convenience, were obliged to submit to many parliamentary restrictions and obligations, if these rights which they obtained upon such terms were to be interfered with by a company who had submitted to no terms at all, but are formed upon the principle of systematically violating the law. With regard to the delay which the \* Vice-Chan- \* 308 cellor considered fatal to the plaintiffs' and relators' case, the plaintiffs gave the notice on the 11th of June to the surveyors of the district, that they objected to the defendants' proceedings. It is mere mockery to say that the defendants did not know of these notices. If they have entered into any contracts, they have done so with the knowledge that the plaintiffs were about to act on the Vice-Chancellor's suggestion made when the injunction was applied for upon the bill, before the filing of the information. That bill was dismissed on the 26th of July. Twelve days afterwards the information was filed. Moreover, time is not so important in the case of a public as in that of a private inquiry. They referred to *Walter v. Selfe*, (a) *Attorney-General v. Cleaver*, (b) *Duke of Grafton v. Hilliard*, (c) *Crowder v. Tinkler*, (d) *Rex v. Ward*, (e) *Attorney-General v. Johnson*, (g) *Haines v. Taylor*, (h) *Attorney-General v. Forbes*, (i) *Elmhirst v. Spencer*. (k)

*Mr. Bethell*, *Mr. Daniell*, and *Mr. T. H. Terrell*, for the defendants.—The delay that has here taken place is quite sufficient answer to the application for an injunction. After the bill was dismissed, the defendants entered into contracts for their works, before the information was filed, and it is impossible for the Court to interfere without doing injustice to them. (l) No valid excuse is given for such delay.

But the case is equally destitute of foundation as regards \* any claim to equitable interposition upon the merits. \* 309

(a) 19 Law Times, 308.

(b) 18 Ves. 211.

(c) Cited 18 Ves. 219; and see Blunt's edit. of Amb. 160 n.

(d) 19 Ves. 617.

(h) 2 Phill. 209.

(e) 4 A. &amp; E. 384.

(i) 2 M. &amp; C. 128.

(g) 2 Wils. 87.

(k) 2 M. &amp; G. 45.

(l) See *Great Western Railway Company v. Oxford, Worcester, and Wolverhampton Railway Company*, next case.



Although the name of the Attorney-General is used, it is quite clear that he has never been consulted, and that any advantage from these litigations to the public is the last thing which those who have set it on foot have thought of. Indeed, the public interest is altogether on the other side, and in favour of that opposition to the plaintiffs' monopoly which the defendants are effectually making. The opinion of the public has been generally expressed on the subject in the defendants' favour. In *Attorney-General v. Johnson*, Lord ELDON required the Solicitor-General to be specially consulted as to his sanction to the information. It is not every temporary obstruction of the highway that is a nuisance which will maintain an injunction. The ordinary business of life could not be carried on if any such doctrine was acted upon. A temporary obstruction, not wanton or improper, but one which was required for the benefit or convenience of adjoining proprietors, has never been held sufficient ground. In *Attorney-General v. Johnson*, the soil was that under a public river, and the property in it was vested in the Crown. The Crown, therefore, was entitled to abate the obstruction without more. But where the soil is not the King's, unless there is irreparable mischief, the Court will not interfere without the intervention of a jury. In *Attorney-General v. Forbes*, (a) there were facts admitted which rendered an inquiry unnecessary. If the Court is to interfere in such cases, an immense field of litigation will be opened, for there are not less than six hundred gas companies, which are incorporated only under the Registration Act.

They also referred to the *Rockdale Canal Company v. King*. (b)

\* 310     \* *Mr. Rolt*, in reply.

THE LORD JUSTICE KNIGHT BRUCE.—The case divides itself into two portions, one relating to alleged public right, the other to alleged private right.

To take the latter first: This bill was filed on the 14th of July last. The company whose acts it seeks to prevent was notoriously proposed to be formed in the autumn of last year. It was then notorious that the company so proposed meant to do, if they

(a) 2 M. & C. 125.

(b) 2 Sim. N. S. 78.

could, the acts which are sought to be restrained by this motion ; but as I have said, the bill was not filed till July. Now, it has been, I think, taken for granted of late more generally than the authorities warrant, that if there be notice of an objection, it is equivalent or nearly equivalent to the institution of a suit, and that whenever a suit is instituted, the time for the purpose of equitable relief ought not to count, for many purposes at least, against the plaintiff, after the time when notice of the objection was given ; and it is said that notice of objection to this scheme or undertaking was given as early as the autumn of last year, and has been repeated and continued since. I do not, however, accede to the generality of the proposition. The question must depend very much on the circumstances of each particular case, and instances may well be conceived in which, after notice of an objection or opposition, the delay to institute a suit founded on that may well count against the plaintiff. It strikes me that the present is one of those cases, more especially as in the spring a bill was filed for the purpose of preventing what was intended. It was filed on the 17th of April, 1852 ; a motion was made for an injunction accordingly ; the motion was opposed, and was refused with costs on the 24th of May. There was no appeal from the order on that motion, and the \*suit has since been abandoned. The \* 311 same matter is taken up afresh by the present suit. My opinion is, that upon the question of private right, without entering into any other considerations to which this part of the case may possibly be open, that delay furnishes sufficient ground for refusing the merely interlocutory application before us. What it may be right to do at the hearing is a different point.

The question of public right remains ; and though a stronger case of delay is probably required to affect those who assert a public right than where a private right is alone in dispute, yet I cannot agree that delay even in such a case is to be without effect. I think it a circumstance to be attended to. Now, as far as the public right is concerned, there has been no suit whatever, except the present, which was instituted more than half a year after the intention to do these acts had become notorious.

And with regard to the public question, there is another consideration not to be forgotten. I agree that motives are very often immaterial with reference to the manner of disposing of a suit. It has been said by an eminent Judge, that if you were to look

into the motives of suitors, Courts of justice would not sit above a month in the year, and would have little to do. Of course, there are, in numerous instances, motives for litigation, which, if they could be looked into, would prevent a Court of justice from interfering. But generally I agree that it is not the rule so to regard them. Where, however, the public interest purports to be asserted, it is not wholly immaterial, at least upon an interlocutory application, to look into the motives from which, or under which,

the matter is brought forward. Now, in the present case, \* 312 though the Attorney-General's \* name is used, it is impossible not to see that the suit has been instituted more from regard to private than to public good. If the public interest clearly required the immediate interposition of the Court, that might not be material. But we find, as a fact, that the majority of the town council is in favour of what the defendants are proposing to do; and on a question of discretion, it is impossible, with reference to a community of this description, not to look with some degree of attention at what the governing body of the borough think on the subject. It is said that many of the members of the town council are interested in favour of the defendants' undertaking. I dare say that it is so; still they are members of the governing body, and the opinion of the majority is as I have stated. It is plain, moreover, on the evidence, that the opinions and the wishes of a great preponderance in number of the inhabitants of this town are also in favour of what the defendants are doing. That does not legalize what is illegal, but it is a matter surely not to be disregarded, on an interlocutory motion, where the Court is to exercise a discretion, as, in my opinion, it is here bound to do. The case might be different if it were certain or highly probable that what is proposed would be a public nuisance of a dangerous or oppressive description. My opinion is, that the evidence before us does not show that it is likely to be so, though I agree that what is intended will probably or certainly be in law a nuisance.

For the reasons that I have mentioned, without entering into others which might perhaps be suggested, I am of opinion that the present motion ought to be refused, without prejudice to any question, reserving the costs, and giving the plaintiffs leave, and, if necessary, the Attorney-General leave, to proceed at law by indictment or action as they may be advised. I repeat that

\* 313 what \* is now done is not to be considered as binding the

Court to any particular course at the hearing of this cause, when possibly an injunction may be granted.

THE LORD JUSTICE LORD CRANWORTH. — I have come to the same conclusion, and so entirely upon the same grounds, that perhaps it is hardly necessary I should say any thing. My learned brother has pointed out that the case divides itself into two branches. And in form, no doubt, it does. In substance, however, I cannot but come to the conclusion, that the Attorney-General, and the public here, are a mere fiction, and that the real parties concerned are only those that were parties to the first suit.

Looking at it as a question merely between the plaintiffs and the defendants, I think there is abundant reason why there should not be an interlocutory injunction. I agree that there is no necessity for the intervention of a jury, to teach us that digging up a public highway is a public offence, or a public nuisance; but I am very far from seeing my way to the conclusion, that there is likely to be any private injury to these plaintiffs in the sense of there being an illegal act, an act of which the plaintiffs would have any right to complain. If what the defendants are proposing to do is not open to the objection of being a public offence, I am not prepared to say that it certainly must be such an injury to the plaintiffs as to give them a right of action against the defendants. It may be difficult to lay down parallel lines of pipes without some injury being done to those of the plaintiff; but I think that there is not such a case made out as to render it discreet for this Court to interfere interlocutorily by an injunction before the fact had been established one way or other by a trial.<sup>1</sup> That \* seems \* 314 to me to dispose of the question so far as the plaintiffs are concerned.

But then the plaintiffs fall back on what is the alleged injury to the public. Now, I have already said that, in my opinion, this was an afterthought, and constituted no part of the original grounds of this litigation. I observe that the relator is in truth the same as the plaintiff. The grievance complained of is, that in the progress of their works the defendants must do that which would constitute in point of law a nuisance. I dissent from *Mr. Rolt's* proposition in point of law, that if it be once established

<sup>1</sup> See *post*, p. 325, note (1); *Broadbent v. Imperial Gas Co.*, 7 De G., M. & G. 443; *Coe v. Lake Co.*, 37 N. H. 254.

that there is a public nuisance, there must be an injunction to restrain it. To what extent will that go? Every day there are nuisances in the streets of London; but it cannot be said that in every case where an indictment would lie there must be a title to an injunction. I have no doubt that what the present Lord Chancellor said, qualified in the mode in which he meant it, is perfectly right. Once establish that the setting up something permanently is a nuisance, and it is immaterial whether it is more or less. And it was upon that principle that I proceeded in the case that was referred to of the Rochdale Canal. (a) There, if I remember rightly, the plaintiffs were the owners of a very valuable canal. Adjoining owners of property to which the water was necessary paid them a sort of rent (I think they called it a water rent) for taking off a certain quantity of water from time to time. The defendants contended that they had a right to take it without any such license: they, accordingly, did abstract it, and drove the plaintiffs to bring an action against them. The plaintiffs did so, and established their right,—recovering, it is true, only

\* 315 a shilling, because the \* real question was to try whether there was a right, or not. After that the defendants defied the plaintiffs, and said, “You will never recover more than a shilling.” I held, that although drawing off a hundred gallons of water was a small thing, for which a plaintiff would not recover more than very trifling damages, yet the defendants were trying to baffle justice in a way that this Court would not tolerate. That is the principle on which I understand the Lord Chancellor proceeded in the case of the brick manufactory. What the Lord Chancellor meant to say was this: The Court will not let a person set up a nuisance, and say it shall remain because it is very little. If it is a nuisance, and is likely to continue, the Lord Chancellor said that shall not be allowed. But how does that case apply here? It is true, that it may be said to be a violation of the law to dig up or interfere with the road wherever her Majesty’s subjects have a right of way; but what is urged, on the other hand, is, that this interference is infinitesimally small, and is much more than compensated in point of convenience to those who will be injured by it by the results which are to follow. Whether that view of the case is correct, it is not necessary to speculate upon; but it is a satisfac-

(a) 2 Sim. N. S. 78.

tory guide to the discretion of the Court to say, that probably the convenience resulting from it will preponderate over the inconvenience.<sup>1</sup>

I think this is not a case in which this Court is bound to interfere, because there may be what amounts in point of law to a nuisance, and I concur therefore entirely in the judgment that has been given by Sir GEORGE TURNER, qualified in the way that my learned brother has pointed out,—that this motion should be refused, reserving the costs, and with liberty to the parties to \* bring such action or indictment as they may be advised \* 316 in order to try their rights.

Before the commencement of Hilary Term, 1853, notice of motion was given on behalf of the plaintiffs for the first day of that term, upon new facts rendering it, as it was alleged, necessary for public safety that an injunction should be granted.

1853. January 12, February 1. Before the Lords Justices Sir J. L. KNIGHT BRUCE and Sir G. TURNER. February 8, 16. Before the Lord Chancellor and the LORDS JUSTICES.

On the motion coming on to be heard before the Lords Justices, it was agreed that the cause should be at once decided as at the hearing upon the evidence before the Court. It was argued accordingly ; but before any decision was given, their Lordships suggested that it had better be reargued before the full Court. Accordingly it was reargued before the full Court by one counsel on each side.

*Mr. Rolt*, *Mr. Amphlett*, and *Mr. Overend* supported the motion.

*Mr. Daniell*, *Mr. T. H. Terrell*, and *Mr. Logie* opposed it. — The additional facts brought forward and the arguments appear sufficiently from the judgments. In addition to the authorities cited upon the former hearing, *Attorney-General v. Doughty*, (a) *Attorney-General v. Nichol*, (b) *Wynstanley v. Lee*, (c) *Rex v. Russell*, (d) *Rex v. Tindall*, (e) *Attorney-General v. London and South-Western Railway Company*, (g) *Haines v. \* Tay* \* 317

(a) 2 Ves. Sen. 454.

(c) 2 Swans. 333.

(e) 6 Ad. & El. 143.

(b) 16 Ves. 338.

(d) 6 East, 427.

(g) 3 De G. & S. 439.

<sup>1</sup> See 2 Dan. Ch. Pr. (4th Am. ed.) 1640, and cases in notes 2 and 3; *Hodgson v. Earl of Powis*, 1 De G., M. & G. 6, and cases cited in note (2).

lor, (a) *Chartered Gas Company v. Central Gas Company*, (b) and 5 & 6 Will. 4, c. 50 (the Highways Act) were referred to.

February 16.

THE LORD JUSTICE TURNER. — This is an information and bill, the information filed by her Majesty's Attorney-General at the relation of Edwin Unwin, who is the secretary or manager of the Sheffield United Gaslight Company, and the bill by the Sheffield United Gaslight Company, against the Sheffield Gas Consumers Company, for the purpose of obtaining a perpetual injunction to restrain the Sheffield Gas Consumers Company from laying down any gas mains or pipes or other works, in or under the streets or highways of the borough of Sheffield, or any part of them, and from breaking up or disturbing for that purpose the road or pavement of the said streets or highways, or any of them, and from doing any other act whereby the passage of her Majesty's subjects along the said streets or highways, or any of them, shall be in any respect obstructed or rendered less safe or convenient, or whereby the gas mains or pipes or other works of the plaintiffs may be in any way injured or damaged.

The general outline of the case, without entering into the particular details, appears to be: that there existed from the year 1818 up to the year 1836, in Sheffield, one gas company, that company being incorporated by Act of Parliament; that in the year 1836 another company was formed which continued to supply the town of Sheffield with gas, with the original company, down to the year 1844; that in the year 1844 an amalgamation

\* 318 of those two companies took place under the \* title of the Sheffield United Gaslight Company; that in the year 1851, about the autumn of that year, the Sheffield Gas Consumers Company was begun to be formed; that about March, 1852, the Sheffield Gas Consumers Company was duly registered under the provisions of the Joint Stock Companies Act; and that thereupon in the month of April, 1852, a bill was filed by the present plaintiffs, the Sheffield United Gaslight Company, against the Sheffield Gas Consumers Company, for the purpose of restraining them from laying down their pipes. At that time no pipes had been laid down by the defendants, the Sheffield Gas Consumers Company, and the

(a) 10 Beav. 75.

(b) Before Lord TRURO, reported in the Gas Journal.

case therefore which then came before the Court was entirely a case of anticipated mischief. A motion for the injunction prayed by the bill was made before me as Vice-Chancellor, and judgment was given upon the motion on the 24th of May, 1852. I was of opinion that the plaintiffs had not succeeded in making out so clear a case of anticipated mischief as would warrant the Court in interfering by injunction, and therefore refused the motion. From the month of May, 1852, nothing further took place till the month of July following, at which time the present information and bill was filed, and thereupon application was again made to me as Vice-Chancellor for an injunction on the part both of the Attorney-General and of the plaintiffs. That motion shared the same fate as the preceding one. I thought that the plaintiffs had not made out a case entitling them to the injunction. My opinion on that subject not being satisfactory to the parties, the case was carried up to the Lords Justices, and on the 6th of August, 1852, the Lords Justices also thought proper to refuse that motion.

It appears that the Gas Consumers Company began to lay down their pipes in the month of October, 1852; and in the month of November another notice of motion \* was given \* 319 before the Lords Justices for the injunction. Upon that motion coming on, it was considered that it would be better for both parties that the cause should be heard. The cause has been heard accordingly, and it is now for us to consider what is right to be done upon the motion and the hearing of the cause.

The question important to be considered in the present case appears to me to be what is the general principle on which this Court interferes in cases of this description; and I take that principle to be the inadequacy of the remedy which the law gives in such cases.<sup>1</sup> That was distinctly laid down by Lord ELDON in the case of the *Attorney-General v. Nichol*. (a) Lord ELDON there says, addressing himself to the interference of the Court in cases of this nature: "The foundation of this jurisdiction interfering by injunction is that head of mischief alluded to by Lord HARDWICKE, — that sort of natural injury to the comfort of the existence of those who dwell in the neighbouring house, — requiring the application of a power to prevent as well as remedy an evil for which damages more or less would be given in an action at law.

(a) 16 Ves. 338.

<sup>1</sup> See 2 Dan. Ch. Pr. (4th Am. ed.) 1637, and cases cited in note (5).



The position of the building, whether opposite, at right angles, or oblique, is not material. The question is, whether the effect is such an obstruction as the party has no right to erect, and cannot erect without those mischievous consequences which upon equitable principles should be not only compensated by damages, but prevented by injunction." Lord ELDON, therefore, in that case clearly refers the jurisdiction of the Court to the extent of the injury, and to the preventive power of this Court as being superior to the remedy which can be obtained at law.

But it is said that however that may be in a case of  
 \* 320 \* private nuisance, which was the case to which Lord ELDON was addressing himself in the case of the *Attorney-General v. Nichol*, it is different in the case of a public nuisance, and that it is the duty of this Court to interfere in all cases of public nuisance. The argument is put thus: it is said that no injury or inconvenience which is merely trifling would amount to a nuisance at law, that the very fact of there being a nuisance at law imports that the injury is great and the inconvenience considerable, and, therefore, it is said that the interference of this Court must take place whenever there is a nuisance at law.<sup>1</sup> I confess, however, that looking at the principles on which, as I apprehend, this Court interferes, it does not appear to me that there can be any sound distinction between cases of private and public nuisances. It is not on the ground of any criminal offence committed, or for the purpose of giving a better remedy in the case of a criminal offence, that this Court is or can be called on to interfere. It is on the ground of injury to property that the jurisdiction of this Court must rest; and taking it to rest upon that ground, the only distinction which seems to me to exist between cases of public nuisance and private nuisance is this,—that in cases of private nuisance the injury is to individual property, and in cases of public nuisance the injury is to the property of mankind.

I think, therefore, that the same principle must govern the question as to the interference of the Court, whether the case be one of private or of public nuisance. What, then, is the principle by which the Court ought to be governed? I take it to be this: whether the extent of the damage and injury be such that the law will not afford an adequate and sufficient remedy. The

<sup>1</sup> See per Sir R. MALINS, V. C., in *Attorney-General v. Cambridge Consumers Gas Co.*, L. R. 6 Eq. 297.

same principle which governs the Court in other cases, in which its jurisdiction is more generally applied, seems \* to \* 321 me to apply in such cases as the present. In cases of specific performance the jurisdiction of this Court is founded on the inadequacy of the remedy at law. If the specific performance of a covenant be asked, it is not every covenant which this Court will perform, but such covenants only as cannot be adequately compensated in damages. So again, in cases of trespass, it is not every trespass against which this Court will enjoin ; but such trespasses as are, or are assumed to be, irremediable, or at all events material ; and so I take it to be in cases of nuisances.<sup>1</sup>

The question, therefore, which we have to consider appears to me to be whether this is a case in which the remedy at law is so inadequate that the Court ought to interfere, having regard to the legal remedy, the rights and interests of the parties, and the consequences of this Court's interference. Looking at the case in this point of view, it is a mixed case of public and private injury. In considering it, I think it important to separate the two questions of public injury and private injury. The injury to the public which is complained of arises from the interest of the public in the streets of Sheffield : it is said that the streets of Sheffield will be materially impeded by the laying down of the pipes of this company, and by the continual taking up of those pipes for the purpose of repairing them when they have been once laid down. As to the laying down the pipes, according to the evidence as it stands before us, that operation will occasion an inconvenience of two or three days' duration only. I think that in the case of Neepsend Lane, it was proved that there was an interruption of five or six days ; but in that case it was proved also that a negotiation was pending at the time either between the two companies or between the municipal authorities of Sheffield and the defendants' company, which prevented \* the completion of \* 322 the works there within the period within which they would according to the ordinary course have been completed. The inconvenience, therefore, is partial and temporary : when the pipes are laid down, the works will in that respect be completed. And if this Court is to interfere on the ground that the laying down of these pipes will occasion a temporary obstruction in the streets of

<sup>1</sup> See 2 Dan. Ch. Pr. (4th Am. ed.) 1637.

Sheffield for two or three days, I am at a loss to see how the interference of this Court could be withheld in the case which has been put in the argument of boards erected in the public streets where houses are under repair, or in the case of cellars being made under the public streets, or in the case of the pavement being obstructed by goods being deposited upon it. All these are nuisances in a greater or a less degree; and if this Court is to interfere on the ground that the pavement of Sheffield will be taken up for two days for the purpose of laying down the pipes of this company, it seems to me that it will be equally bound to interfere in the cases to which I have referred. As to the continual taking up of the pavement consequent on these pipes having been laid down, that inconvenience will also, as it appears to me, be partial and temporary only.<sup>1</sup> It will be an inconvenience occurring from time to time in different parts of the town, and not an injury affecting the general body of the inhabitants to any such extent as ought, in my opinion, to induce the interference of this Court. It is not to be left out of consideration in determining this question, that to some extent the law has provided a remedy in respect of these inconveniences. There is some remedy under the Highway Act; and there are boards of surveyors having control of the streets who, it is to be remembered, concur in these measures being taken; and as to any injury which private individuals may sustain, the law is open to them by actions on the case.

\* 323     \* Something has been said in the course of the argument of the danger to the public peace which may ensue from the non-interference of this Court; but surely this Court cannot suppose that there is an inadequacy of the civil power to preserve the public peace. I say nothing on the question whose fault it will be if this disturbance of the public peace takes place. It is true, as the plaintiffs admit, that if they do not interfere, the probability is that there will be no disturbance; but they say that they are justified in interfering, as it is the only means by which they can prevent these illegal acts being done. I do not think, however, that it is competent to parties to come to this Court and say that the inadequacy of their legal remedy gives them a right to do acts occasioning breaches of the peace. The argument seems to me to

<sup>1</sup> See the remarks of the same Judge in reference to this point and adhering to the same opinion, in *Goldsmid v. The Tunbridge Wells Improvement Commissioners*, L. R. 1 Ch. Ap. 349, 354, 355.

go too far; it would apply to every case of an illegal act,—to every nuisance or trespass, however trivial; for any of these nuisances or trespasses might in the result lead to a breach of the peace.

Some observations have been made with reference to the delay in this case, on which it may be right for me to say a few words. I agree with the argument which has been urged on the part of the plaintiffs, that, so far as they, individually as plaintiffs, are concerned, it is impossible on this record to impute to them any delay. But with reference to this proceeding, so far as it is a proceeding by the Attorney-General, I do not concur in the argument urged on the part of the plaintiffs, that there is no ground for imputing delay, or that delay can have no influence on such a question as the present. In truth, the case as to the Attorney-General stands thus: The works of this company were begun in October, 1851, and it is not till July, 1852, that the Attorney-General takes any proceeding to restrain the execution of those works. In the mean time the company have \* been \* 324 allowed to enter into contracts and take proceedings without any interference on the part of the Attorney-General. That delay will affect the Attorney-General as much as a private individual I am not prepared to say; but, in my opinion, it is a circumstance to be considered in determining the question whether this Court shall interfere, although the application to the Court be on behalf of the Attorney-General, and I ground myself in that opinion upon what fell from Lord ELDON in the case of the *Attorney-General v. Johnson*. (a) In that case Lord ELDON distinctly states his opinion to be that delay is to be considered in determining a question of injunction, though the application may be by the Attorney-General on behalf of the public. I think, therefore, that this case fails, so far as the public are concerned.

There remains, then, the question of the private right of the plaintiffs. The question, as I view it, upon this point is, what is the injury to the plaintiffs in their character of a joint-stock company beyond that which the public sustain. It is said that there is damage to their pipes. If so, there is a remedy in an action on the case; and I do not think that there is any case established of damage to the pipes of the plaintiffs sufficient to justify the inter-

(a) 2 Wils. 87.

ference of this Court on the ground of private nuisance. I have been throughout this case very much struck with the great strength of the affidavits made on the first application as to the anticipated nuisance,—the enormous inconveniences which were then anticipated as likely to result to the plaintiffs from the defendants being permitted to lay down their pipes at all,—and what, in my opinion, is the very different aspect of the case on the \* 325 affidavits as they now stand, \* showing that the injury anticipated in April, 1852, and so strongly deposed to on that occasion, has not been realized, though it is in evidence that six miles of the pipes of the defendants have been already laid down in the streets of Sheffield. It was suggested with reference to this question of private right that there would be great injury to individuals by reason of the defendants, in consequence of their pipes having been laid in property belonging to others, acquiring an easement in such property. But this seems to me to be a private injury to each individual, and not a nuisance to all the inhabitants; and if the case be considered as one of private injury to each individual, I think it is not a case in which this Court could on this record interfere: if the case be considered as one of nuisance to a private individual, it is a nuisance of which some individuals would approve and others disapprove. It is evident from the affidavits that there are many of the inhabitants of Sheffield who would be and are willing and desirous that these pipes should be laid down before their houses, although others may be desirous that it should not be done. It cannot, therefore, be brought forward as a case of common injury to all, and as a case of private injury to each it does not seem to me to be open on the present record.

Another view which has struck my mind with reference to the interference of this Court in cases of this description is this: These parties are here coming into equity on purely legal grounds, and in a case in which there may be some possible doubt as to the result of the proceeding at law. I take it that in a case of that description the ordinary course of this Court is to allow the proceedings at law to go on, in order that the Court may be in a position to see what the result of those proceedings may \* 326 be.<sup>1</sup> It is upon an equity founded on a \* legal right that

<sup>1</sup> See 2 Dan. Ch. Pr. (4th Am. ed.) 1635 note, 1640, 1641, and cases cited. What is nuisance is chiefly a subject for a jury, and to be ascertained by an

the plaintiffs come, and for an extension of the legal remedy. Ought it not to be seen whether the legal right exists before this Court will interfere? The effect of the interference of this Court would be to prevent the legal question being tried at all.

Upon these grounds, and on looking, which I have done carefully, through the affidavits in this case, being satisfied that there is not that extent of mischief which, in my opinion, would justify the interference of this Court, the conclusion that I have arrived at is that this information and bill ought to be dismissed. If it shall eventually appear that there is any such excessive mischief as is contemplated on the part of the plaintiffs, it will be quite open to them, notwithstanding the dismissal of the bill, to file a fresh information or bill, and make a new case upon new facts; but upon the facts as they at present stand, my opinion is that this information and bill ought to be dismissed.

THE LORD JUSTICE KNIGHT BRUCE. — In making the order of the 6th of August last, the Lords Justices intended it certainly to be without prejudice to any question, and particularly meant that it should not hamper or interfere with the judicial discretion of the Court as to the mode of dealing with the suit at the hearing. If that intention or that meaning is not clearly expressed in the order as drawn up, it has not been drawn up as it ought to have been. I believe, however, that by neither side have they been misunderstood in this respect. My present impression is, that the order, intended and understood as I have mentioned, having been made merely upon an interlocutory application in the state of facts and circumstances then presented to the Court, was not an erroneous or incorrect order. If, however, the question is asked,

action before granting relief. See *Attorney-General v. U. K. Elec. Tel. Co.*, 5 L. T., N. S. 328; 2 Seton Dec. (3d Eng. ed.) 898; *Cleeve v. Mahony*, 9 W. R. 882; *Wason v. Sanborn*, 45 N. H. 171; *Eastman v. Company*, 47 N. H. 71; *Eaden v. Firth*, 1 H. & M. 573; *Freeman v. Tottenham and Hampstead Railway Co.*, 11 Jur. N. S. 254; 13 W. R. 1004, L. JJ. Where the thing sought to be restrained is not unavoidably and in itself noxious, but only something which may according to circumstances prove so, then the Court will refuse to interfere, until the matter has been tried at law. Per *BROUGHAM*, L. C., in *Ripon v. Hobart*, 1 Coop. Sel. Cas. 333; S. C., 3 My. & K. 169; *Inchbald v. Barrington*, L. R. 4 Ch. Ap. 388; *Mason v. Sanborn*, 45 N. H. 169, 171, and cases cited; *The Universities of Oxf. and Camb. v. Richardson*, 6 Ves. (Sumner's ed.) 689, note (a).

\* 327 whether I \* now consider that in disposing of the motion, so far as I was concerned, I expressed myself with sufficient fulness and altogether correctly, I must own that I have more misgiving as to the proper answer. Probably what I then said was well susceptible of amendment, as well as addition.

An able and eminent member of this bar, whom we have lost, used to say that there was no justice in August. Not agreeing with him to that extent, I do acknowledge that ever since I have been acquainted with the Court, there has been a prevalent notion that its light is at that season often in the wane, and I will not undertake to aver that on the 6th of August, 1852, I furnished any assistance towards a contrary opinion. It is, however, not material on the present occasion whether the Vice-Chancellor and the Lords Justices disposed correctly of the motions heard and decided by them respectively last year. Neither of the orders then made, merely interlocutory as they were, can or ought to influence the Court now in granting or refusing an injunction. Not only is the motion before it a new motion, we are also at the hearing of the cause, and this upon more evidence than that adduced in August, 1852, and upon facts some of which have occurred since that month. Perhaps the motions refused were properly refused. Perhaps they ought to have been wholly or in part successful. The present question is of a decree to be made.

One point suggested against the informant and plaintiffs is that of acquiescence or laches. I think no such point established. Early and speedily after the first announcement of the defendants' project, the plaintiffs protested against it openly and publicly, and they have uniformly declared and asserted practically their

\* 328 opposition to it. Whether this suit was instituted \* soon enough to entitle the informant and plaintiffs to an interlocutory order for an injunction may be disputable, but it was commenced, I think, soon enough to warrant them in asking for a decree, if making a case for one in other respects. The expenditure of the defendants has taken place under full notice that it was objected to, and that endeavours were, and would be, in active operation to render it fruitless and useless on the grounds or alleged grounds taken by the information and bill.

Then comes the question, whether the acts done and intended by the defendants, of which the informant and plaintiffs complain, amount, or if performed will amount, to a nuisance in point of

law. And upon the evidence now before the Court, I think that this question must be answered in the affirmative, if propounded for the purpose, and in the sense, of the information or bill separately, and, therefore, in the affirmative, if 'propounded for the purpose and in the sense of both together. Various public highways in the town of Sheffield have, since July last, in the prosecution of designs previously announced, been unlawfully broken up for the purpose of laying down the defendants' pipes. The same course of proceeding is intended to be with equal unlawfulness pursued by them in other public highways of the town to an extent still greater. And it must be taken as substantially certain that hereafter (in case of the absence of judicial interference preventively) the highways along or under which the plaintiffs' pipes lawfully, and the defendants pipes unlawfully, have been and shall be laid, will in various places be from time to time, without just right or lawful power, broken up by the defendants for the purpose of repairing their pipes (whether in consequence of casualties which may happen to affect them or otherwise), and for the purpose of making communications between their main pipes and \* dwelling-houses, or other buildings. These illegal pro- \* 329 ceedings, effected and intended, present and future, may perhaps well be said in one sense to be of a temporary or transitory, and not a perpetual or permanent kind. But, from the nature of the case, there is obviously, I think, another, and, probably, a more important sense, in which a character of perpetuity or permanence may properly be ascribed to them. It has been argued that the annoyance (if any) felt, and possible to be feared, must be small, slight, and unfit for this Court's interference. But the frequent recurrence for ever, or during a period probably long and unascertainable, of an annoyance, slight in itself (slight I mean if occurring but upon a single occasion, or recurring only at very rare intervals) may much interfere with the reasonable convenience and comfort of life.<sup>1</sup> Upon the evidence now before us, it is, I think, reasonable to believe that during a period probably long and unascertainable, the defendants' proceedings under consideration, unless judicially prevented, will unlawfully be of frequent recurrence, and will unlawfully create, from time to time, often inconvenience to persons who as travellers or passengers

<sup>1</sup> See 2 Dan. Ch. Pr. (4th Am. ed.) 1637, and cases cited in note (5).



may have occasion to use the public streets and highways in Sheffield, to shopkeepers and other inhabitants of the town, and to the plaintiffs; nor, if we now refuse an injunction, can it reasonably, I think, be denied that in respect of these unlawful proceedings, actual and intended, redress, remedy, or punishment may from time to time, for many years to come, be sought at law criminally and civilly, as well summarily as otherwise, to a very inconvenient and burdensome extent of diversified litigation, at the instance of a variety of persons. This the defendants may, it is true, be inclined to disregard. But what they are indifferent to,

may be of importance to the plaintiffs, and to some at least \* 830 of \* those on whose behalf, or for whose interest or protection, the Queen's Attorney-General is to be considered as suing here. There are persons certainly who are pleased with the operation of putting the law in motion in its numerous departments, nor dislike its frequent repetition; this, however, more often vicariously than otherwise; but, in theory, if not practically, the multiplication of suits and prosecutions must be considered something very different from a blessing, — so far, at least, as her Majesty's unprofessional subjects are concerned.

There is, too, another aspect of this case which may deserve attention. *Mr. Overend*, before the Lords Justices in January of this year, assumed not unreasonably, and argued on the possibility, that the defendants in the course and by the aid of time may, through submission or acquiescence (this Court not interposing), acquire in the soil, or the use of the soil, of the streets and highways where their pipes are proposed to be and are now laid, a right not now existing, which, if acquired, may probably be found of considerable inconvenience publicly as well as privately. I do not know that this argument has been displaced or answered. Certainly, I am aware that the bill in this cause is a bill by the plaintiffs on their own behalf merely. But it cannot be denied that by way of easement or otherwise they have, in the soil of the streets and highways within the range of their Act of Parliament, an interest exceeding and different from that of persons merely entitled to use them for walking, riding, and driving, or to have the approaches along them to their shops, warehouses, and dwellings preserved in an uninterrupted or unobstructed state.

Something has been said on the subject of riots or \* 831 \* unlawful assemblies, of skirmishes and battles between

the opposite forces, native and auxiliary, of the contending companies, as likely to be rife and serious unless we shall interfere, but into that part of the argument I consider it unnecessary to enter. It seems, however, right to notice the incorporation, whether completely or incompletely, of the defendants, and the quantity of persons thus associated together. They have the advantage and strength of lastingness, union, numbers, and it may well be thought (nor is it new to hold or to act upon the opinion) that infringements, even seemingly slight infringements, of right in respect of land by persons or bodies so circumstanced require especially to be watched with a careful eye, and repressed with a strict hand by a Court of Equity where it can exercise jurisdiction.

The propriety of the bill may probably well be thought open to more doubt than the propriety of the information in the present case, but I consider both to be well founded,—the information, upon the ground of the public and general nature of the nuisance; the bill, if on no other account, yet on account of the interest in the nature of a private interest, whether by way of easement or otherwise, in the soil of the public highways of Sheffield, which I have referred to; that, namely, which the plaintiffs as a company have under their Act of Parliament; an interest likely, I think (as I have said), to be prejudiced by the defendants' illegal proceedings, not a prejudice in the sense or way of interference with a monopoly (for the plaintiffs cannot truly be said to have any right in the nature of a monopoly), but they are entitled certainly to have their pipes protected, and to exercise freely the powers conferred on them by the legislature, which has, for the general good, placed \* them under obligations and liabilities that the defendants are exempt from. \* 332

- \* It has been urged, and perhaps not without foundation, that the majority, or, at least, a very considerable portion, of those who compose the governing bodies, and of the inhabitants generally, of Sheffield, are disposed against this suit, and wish well to the defendants and their operations, which, it is also plausibly contended, will, on the whole, be rather for the convenience and advantage than to the inconvenience or disadvantage of the town generally. The fact, too (I suppose true), is urged that there are many parts of England, where companies such as the defendants', and constituted for similar purposes, exist, whose works,

without any authority from the legislature, and without litigation or objection, have long been and are still interfering with streets and public highways in the manner here complained of and sought to be prevented. Each of these considerations probably deserves some attention, but they are not, I conceive, conclusive in the defendants' favour, and are, in my opinion, outweighed by others.

If this suit is opposed to the views and wishes of a majority of the governing bodies and general inhabitants of Sheffield, the minority do not therefore lose their rights. Their views of what is for the convenience and advantage of the town are not necessarily to be disregarded in a case where they have law on their side; and if the informant and plaintiffs would have an equity independently of what has been or is going on in other towns or places, they are not to be deprived of it because the inhabitants of those towns or places may through the success of this suit be disturbed or inconvenienced. The legislature is open to all, and,  
 \* 333 therefore, \* to the defendants, who, if they shall desire parliamentary authority for their undertaking, and shall make a case for it, will, I dare say, obtain it. The probably great expense of an opposition before committees of the two houses of Parliament has been fairly enough made the subject of remark, but ought not to influence our judgment.

It has been said, too, that there are parish surveyors or local boards, to whom or to which the defendants have been and are willing to submit themselves; and certain agreements on that subject, perhaps of a lawful, perhaps of an unlawful, nature, have been produced. But neither are the powers of these surveyors or boards of such extent or force or practical utility for the purpose now under consideration, as those which the Court of Chancery can exercise; nor, if they were, could it be right for this Court therefore to abdicate an important and useful branch of its known and undoubted jurisdiction; nor can the Attorney-General, or those for whose rights or interest he sues, or the plaintiffs, be required to trust or resort to the activity, discretion, or judgment of any surveyors or board, present or future, changing or unchanging, partial or impartial, wise or otherwise, for the prevention or protection which it is the object of this suit to obtain.

There are legal proceedings pending, with which the relator and plaintiffs upon having an injunction, if they shall obtain one, ought, I think, to undertake to deal, so far as they can, in any manner

that this Court, upon any application or suggestion from the defendants, now or hereafter, may deem reasonable. But the pendency of those proceedings ought not, in my judgment, to delay or impede the action of this Court in a case, \* where the law and facts appear to me to be free from \* 334 obscurity;<sup>1</sup> especially since an important statute which, though at present in operation, was, I believe, not so in August last: not forgetting the expressions attributed, and probably with correctness, to Lord ELDON in *Attorney-General v. Cleaver*, (a) but also not forgetting those to be found in *Crowder v. Tinkler*. (b)

I am of opinion that the informant and plaintiffs are entitled now to an injunction until further order, substantially, though not exactly, in the terms in which they pray it, upon the undertaking that I have just mentioned being given by the plaintiffs and the relator; with liberty for either party to apply: a liberty which may perhaps be especially useful in the event of a certain result of the trial of the pending indictment. As to the costs of this suit, I have entertained, and still entertain, too much doubt to enable me to concur in any order as to any of the costs of the relator, or the plaintiffs, or the defendants.

THE LORD CHANCELLOR. — This cause comes on to be decided under circumstances somewhat unusual, and whatever may be the result, at least it cannot be said that the subject has not in one form or another received a more than ordinary degree of consideration and discussion. A motion for an injunction was made first in the spring of last year, before Lord Justice TURNER, when he was Vice-Chancellor. That was made upon the bill, before there was any information filed, and was refused. An information and bill were then filed, and the motion was renewed. I say renewed, although the application was in some \* sort a new \* 335 and distinct motion. But the same question had to be discussed, and Lord Justice TURNER, with his usual accuracy and attention, again considered the subject, and came to the conclusion that the injunction ought to be refused. That motion was

(a) 18 Ves. 211.

(b) 19 Ves. 617.

<sup>1</sup> If the evidence is satisfactory, the Court will grant an injunction against a nuisance without hearing the question, whether there is a nuisance, tried before a jury. *Inchbald v. Robinson*, *Inchbald v. Barrington*, L. R., 4 Ch. Ap. 388.

brought by way of appeal before the Lords Justices, and heard by them a day or two before, but finally decided on the 6th of August, when the Lords Justices were of opinion that the Vice-Chancellor TURNER had rightly decided, and affirmed therefore the order which he had made. Application was then made to the Lords Justices in Michaelmas Term last, proposing to renew the same motion, but upon a new state of facts, which had arisen since the former motion had been disposed of; and the Lords Justices then suggested that it would be better for the cause to be set down for hearing upon affidavits, according to a course which has been usefully and frequently adopted of late, and for the cause and motion to be heard and disposed of at once. The parties adopted that suggestion, and the cause came on to be heard before the Lords Justices in the last term. After it had been argued they intimated to me, not having finally made up their minds on the subject, an apprehension that they might not concur in their views as to what ought to be done. And although the legislature has in such cases provided for such a result when that which is before the Lords Justices is an appeal from some other decision, no such provision is made with reference to an original hearing. The Lords Justices in this state of things proposed that the cause should be heard again either by me alone, or by the full Court, the latter of which courses I thought much the better one. The case has now been fully and very ably argued, necessarily consuming a good deal of time from the number of affidavits, and I have come to a conclusion against the plaintiffs.

• 886 \* I will state shortly the grounds on which I have arrived at that conclusion. It appears to me that both the Lords Justices concur substantially on this point, that it is a question of degree whether the Court will interfere or not. If that be the right view of the case, then the question is, whether or not such a probability of substantial injury to the rights of the public passing along the streets of Sheffield, or the inhabitants using those streets, has been made out as to make it a reasonable exercise of jurisdiction for this Court to interfere by granting an injunction. I confess that in the course of the argument a doubt did pass through my mind whether the Lords Justices had rightly decided in August, but I have come to the conclusion, not only that that doubt was not well founded, but to a still stronger conclusion upon the hearing, that there is no case for enabling us to act otherwise than as

we then acted. Is the evil of such a nature as to justify the Court in interfering? It is said that the defendants are about to tear up the streets to an extent, on one side represented as 70 miles, on the other as 100 miles. Take it that 100 miles of the streets are to be torn up. It may be that before the defendants complete their works they will have taken up the pavement over 100 miles, but they will never have up above 20 yards at the same time, and they will never have even that length up, they say, for above two days. That agrees with one's experience from what one observes when similar works are going on in the metropolis. They are no sooner begun than ended.

The circumstance of the works being performed in this case in a vast number of places in the course of the next two or three years, or the next year, during which time the process of laying down the pipes will be going on, does not appear to me at all to vary the case. \* One must look at the quantum of \* 337 evil at each particular place and at each particular moment of time, to determine whether this injunction ought to be granted.

It may be asked by way of illustration, why does not the Court restrain persons from coming with barrel-organs through a town and disturbing the peace of the inhabitants? No doubt it would be a very serious nuisance if a person with a barrel-organ or bag-pipes were to station himself under one's window all day; that would be a nuisance. But when he is going through a city, you know, he will stop ten minutes at one place and ten minutes at another, and so he will go on all day. If the one sort of nuisance could be restrained, I do not see why the other could not. There is a distinction, no doubt; the one interferes with the soil, the other does not involve any interference with the soil. I do not see in point of principle that this distinction makes any great difference.

But I do not rest this case merely on my own opinion as to its being a very small degree of injury, but I think it may be safely deduced from the acts of the legislature that it is to be so considered. I come to this conclusion from the different statutory provisions to which our attention has been called. The Joint-stock Companies Registration Act (a) contains in the second section a list of certain companies for executing works which cannot be carried into execution without the authority of Parliament, but it does not in-

clude gas companies among them, though such companies are certainly within the operation of the Act. When that argument was pressed, I suggested that perhaps the legislature might con-  
 \* 338 template a company formed for making gas \* behind a row of houses, and supplying the inhabitants with gas through their own land with their consent. That was a suggestion that passed in my mind, but I cannot seriously believe it was any arrangement of that sort that the legislature looked to. The legislature must have looked at the fact, that companies may be formed for the manufacture and supplying a town with gas, and may carry into effect the object which they contemplate, without the authority of Parliament. It must have been deemed possible in some way to supply the inhabitants of a particular town or district with gas, without an express Act of Parliament for that purpose. But it was asked, did the legislature contemplate the violation of the law by tearing up the pavement? Two answers occurred to my mind on that subject. Perhaps the legislature thought that this would only be done with the sanction of the surveyors or proper authorities, which would prevent any thing taking place which they considered injurious to the public who would pass along and use the road or street in which the pipes would be laid, and that such a discretion might be safely intrusted to those authorities. Or it may be that the legislature did not consider the act of taking up the pavement for such a purpose as this a nuisance at all.

That may probably be the question to be decided on the trial of the indictment. (a) If I thought the question of injunction or no injunction depended on that, I should have probably asked the Lords Justices to concur with me in letting this cause stand over till  
 \* 339 after the trial of that indictment. But I do not think so. \* If these proceedings are unlawful, I think the unlawfulness is too slight to warrant this Court's interfering by way of injunction.

But I must say that when the cause was argued before the Lords Justices in August last, and I myself said we do not want

(a) The indictment was tried, and a verdict given for the Crown, with leave for the defendants to move to enter a verdict of not guilty. A rule was accordingly obtained, but was discharged on June 4, 1853, on argument, the Court of Queen's Bench holding that the obstruction amounted to a nuisance. [See *Broadbent v. Imperial Gas Co.*, 7 De G., M. & G. 461, per Lord CRANWORTH, L. C.; *Ellis v. The Sheffield Gas Consumers Co.*, 2 El. & Bl. 767; *Regina v. Longton Gas Co.*, 8 Cox, C. C. 317; 2 El. & El. 651; 6 Jur. N. S. 601; 29 L. J., M. C. 118; *S. C. nom. Regina v. Knight*, 8 W. R. 293.]

any Court of Law to tell us that tearing up the pavement was a nuisance, I did not then advert to the particular circumstance of this case, but merely to the general proposition ; and I cannot say that it appears to me absolutely impossible to be held that the taking up the pavement for such a purpose as this is not a nuisance. I do not say how this may be, but the case may be held to be analogous to one of this sort : If I were to station a cart in the street opposite to my door, obstructing the public highway, I might be guilty of a nuisance for aught I know, and I might be liable to be indicted ; but it would be a sufficient answer to say, that the cart was there only a reasonable time and for a lawful purpose. If it is used in the way in which such things are ordinarily used it cannot be a nuisance so to use it. The public highway is for the convenience of mankind, and so to use it cannot be a nuisance. One of the uses is, that people travelling along with a horse, or carriage, or cart, may draw up at a particular door according to their lawful occupation. So, again, if I have a cart come to my house with five or six tons of coal, of course it will be some time obstructing the public highway, but it is difficult to maintain that in an ordinary street that would be a nuisance.<sup>1</sup> All these cases of nuisance or no nuisance arising from particular acts must, from the nature of things, be governed by particular circumstances. If a carriage were to drive up in Belgrave Square, and stand half the day at the door of a house waiting for some person calling there, I do not think that that could be made out to be a \* 340 nuisance. It may be said to have stayed there an unreasonable time ; but it would be difficult indeed to make out that that was a nuisance. Suppose, however, the same thing happened in the narrow part of the street that runs from Covent Garden to St. Martin's Lane, I do not know that that would not be a nuisance. Each case must be governed by its particular circumstances.<sup>2</sup> The particular place or object in view must be

<sup>1</sup> A householder adjoining a highway may throw his fuel on the street for the purpose of having it carried into his house ; and place building materials there if there is a necessity for it ; but such necessity must be shown. *Commonwealth v. Passmore*, 1 Serg. & R. 219 ; *Wood v. Mears*, 12 Ind. 515. See *Clark v. Fry*, 8 Ohio N. S. 358 ; per *COCKBURN, C. J.*, in *Regina v. Longton Gas Co.*, 2 El. & El. 651, 667.

<sup>2</sup> It must be determined from all the circumstances of each particular case, whether an object permanently placed, temporarily left, or slowly moving in a



regarded. I take it that all these questions are of this nature, "Are you using that which is the subject-matter of inquiry in a reasonable way and according to the uses for which it was intended?"

I am of opinion that no case is made out for an injunction. With reference to the future evil of tearing up the streets for the purpose of repairs and the possibility of accidents, I can only say here that I must deal with those considerations exactly in the same way, and inquire whether there is such a probability of serious injury as would induce this Court to interfere? Everybody who has lived in this town has lived probably in a house where there have been gas-pipes running along the front of it. Speaking for myself, I can say that I have experience of it for some twenty or thirty years and more, and I have never found any nuisance from such a source. I do not mean to say that evils may not occasionally occur, but I think that the interests of mankind require that those things should be disregarded.<sup>1</sup> I concur therefore with Lord Justice TURNER in thinking that this bill and information ought to be dismissed, though I entirely concur with both the Lords Justices that nothing should be said about the costs.

*Mr. Rolt.*—Did your Lordships intimate that it was without prejudice to our filing a new bill?

\* 341     \* THE LORD CHANCELLOR.—In the *Chorley Water-works Case* (a) we held that the dismissal of a bill would not prevent a plaintiff from filing a new bill upon new facts. You may file a new bill upon new facts if you like.

highway, is or is not a nuisance; and this determination must depend on the finding whether or not the given object, under all the circumstances attending its occupancy of the highway, unnecessarily obstructed the free passage of the public upon and over it. The first and principal design of highways is the accommodation of the public travel; but they may lawfully and properly be used for other purposes, provided such use be not inconsistent with the reasonably free passage of the public over them. *Graves v. Shattuck*, 35 N. H. 257.

(a) *Ante*, Vol. 2, p. 852.

<sup>1</sup> See 2 Dan. Ch. Fr. (4th Am. ed.) 1640 and notes.

The GREAT WESTERN RAILWAY COMPANY and Others v.  
The OXFORD, WORCESTER, AND WOLVERHAMPTON  
RAILWAY COMPANY.

1853. February 8, 14, 21. March 1, 6, 16. Before the LORDS JUSTICES.

A broad gauge railway company were shareholders in a mixed gauge railway company, who, by their Act, were bound to construct their line throughout on the broad gauge, and as to part on the narrow gauge also. In March, 1852, they filed a bill, stating that the mixed gauge railway company were about to construct the line throughout on the narrow gauge, although their funds were insufficient to enable them to do so, and also to comply with their Act as to laying down the broad gauge. The bill sought an injunction to restrain the opening of any part of the narrow gauge line, and the further construction upon that gauge until the broad gauge was complete. In April, 1852, the injunction was refused. From that time contests were carried on in Parliament between the two companies, ending in the rejection of certain bills solicited by the mixed gauge company. From August, 1852, to January, 1853, a correspondence was carried on between them as to traffic arrangements. In January, 1853, the broad gauge company instituted a new suit, seeking an injunction to restrain the opening by the mixed gauge railway company of any portion of the line upon the narrow gauge before the broad gauge was completed. In the same month they moved for an injunction in the new suit, and also appealed from the refusal of the injunction in April, 1852.

*Held*, that both motions were too late.

Principles on which the Court acts in refusing applications, either original or by way of appeal, on the ground of laches.<sup>1</sup>

Effect of objection in excluding laches.

THESE were two motions in two different suits; the former in the order of the notices being an original motion, and the other being a motion by way of appeal from the decision of Vice-Chancellor PARKER, reported 5 De Gex & Smale, 437, where the facts up to the date of that hearing are fully stated.

Another motion in a third suit was heard at the same \* time; but as it was not finally disposed of, this report \* 342 will be confined to the two others.

The following short statement of the facts will be a sufficient

<sup>1</sup> See *Graham v. Birkenhead, Lancashire, and Cheshire Junction Railway Co.*, 2 M'N. & G. 146, and cases in note; *Attorney-General v. Sheffield Gas Consumers Co.*, *ante*, 304, and cases in note (4); *Tash v. Adams*, 10 Cush. 252; 2 Dan. Ch. Pr. (4th Am. ed.) 1639, 1640, 1663, and cases cited; 2 Story Eq. Jur. § 969 a; *Bankart v. Houghton*, 27 Beav. 425.

introduction to the judgments, which principally turned on the effect of delay and acquiescence.

By the Oxford, Worcester, and Wolverhampton Act, 1845 (which was the result of a compromised contest in Parliament, between the Great Western Railway Company and the London and North-Western Railway Company), the Oxford, Worcester, and Wolverhampton Railway Company were authorized to construct a railway from Wolvercot, near Oxford (which is on a broad gauge line), to Wolverhampton, crossing the line of the Birmingham and Gloucester Railway (a narrow gauge line) at a place called Abbotswood. By the 38th section the railway was to be constructed to the satisfaction of the engineer of the Great Western Railway Company, and to be of such gauge as would admit of its being worked continuously with that railway. The 44th section required there to be laid down and maintained between Abbotswood and Wolverhampton such additional rails, adapted to the gauge of the Birmingham and Gloucester Railway, as would admit of the narrow gauge traffic proceeding from Abbotswood to Wolverhampton.

By the 11th section the Great Western Railway Company were enabled to become shareholders in the Oxford, Worcester, and Wolverhampton Railway Company, and they had become, in pursuance of this provision, the proprietors of a large number of shares.

On the 22d of March, 1851, three shareholders in the Oxford, Worcester, and Wolverhampton Railway Company filed a bill against the chairman of that company, \* and the Great Western and London and North-Western Railway Companies, stating that the board of directors of the Oxford, Worcester, and Wolverhampton Railway Company were not then constructing and did not intend to construct, the works of their railway according to the provisions of the Act; but were constructing, and intended to construct it, so as to be worked continuously by and with the London and North-Western Railway Company and the Midland Railway Company; and (although their funds were insufficient to construct the whole line upon the mixed gauge) that they had agreed with the two last-mentioned companies to apply to Parliament for powers to authorize them to depart from the terms of their original Act. The prayer of the bill was to restrain any such application from being made to Parliament. Upon the hear-

ing of that suit, Lord CRANWORTH, then Vice-Chancellor, directed a case to be stated for the opinion of a Court of Law, and granted an injunction in the mean time. (a)

On the 18th of March, 1852, the Great Western Railway Company and other plaintiffs instituted a suit on behalf of themselves and the other shareholders in the Oxford, Worcester, and Wolverhampton Railway Company, except such of them as were defendants, stating that the Oxford, Worcester, and Wolverhampton Railway Company were proceeding to construct their whole line on the narrow gauge, and that their funds were not sufficient to enable them so to construct it; and also to comply with the requisitions of their Act, as to the broad gauge, and praying that it might be declared that, according to the true construction of the Acts of Parliament, the Oxford, Worcester, and Wolverhampton \* Railway ought, throughout its whole length, to \* 344 be constructed on the broad gauge, so as to admit of the same being worked continuously with the Great Western Railway; that the Oxford, Worcester, and Wolverhampton Railway Company were not authorized, under any circumstances, to lay down rails on the narrow gauge on that portion of the line which lay between Abbotswood and Evesham, or on any part of their line to the south of Abbotswood; and, further, that they were not authorized on any part of their line to the north of Abbotswood aforesaid to lay rails on the narrow gauge, unless and until they should have laid rails throughout the whole length of the Oxford, Worcester, and Wolverhampton Railway on the broad gauge, so as to adapt the line to be worked continuously with the Great Western Railway: and that the Oxford, Worcester, and Wolverhampton Railway Company, their directors, servants, and agents, might be restrained from taking any steps or doing any act, and particularly from expending the moneys or funds of the company, or any moneys borrowed or to be borrowed by or on the credit of the company, or in any way pledging or using the credit of the company, in or towards, or for the purpose of constructing their line of railway, in the first instance, otherwise than on the broad gauge throughout its entire length, and so as to enable the same to be worked continuously with the Great Western Railway, together with additional rails to the north of Abbotswood and

side lines, pursuant to the provisions of their Acts of Parliament; and in particular, that the Oxford, Worcester, and Wolverhampton Railway Company, their servants and agents, might be restrained, under any circumstances, from laying rails on the narrow gauge on the line between Abbotswood and Evesham, or any part of the line to the south of Abbotswood; and that they might also

\* 345 be restrained, as to that part of the \* line of the Oxford, Worcester, and Wolverhampton Railway which lay to the north of Abbotswood, from laying rails on the narrow gauge, unless and until they should have laid rails throughout the entire length of the railway of the broad gauge; and that they might also be restrained from opening or using any part of the Oxford, Worcester, and Wolverhampton Railway, except a loop line, in the bill mentioned, unless and until they should have laid rails upon and have opened the Oxford, Worcester, and Wolverhampton Railway throughout its entire length on the broad gauge; and also that they might, in like manner, be restrained from constructing or using any of the works of the railway, or laying down or using the rails thereof, otherwise than in conformity with the Oxford, Worcester, and Wolverhampton Railway Act, 1845, and the several other Acts under which the Oxford, Worcester, and Wolverhampton Railway was constituted, and the true spirit thereof.

A motion for an injunction in the terms of this prayer was refused by Sir JAMES PARKER (as has been already mentioned) on the 21st of April, 1852, and it was from this refusal that the second of the above-mentioned motions was an appeal.

On the 10th of January, 1858, the Great Western Railway Company, as sole plaintiffs, filed another bill against the Oxford, Worcester, and Wolverhampton Railway Company, which, after setting forth the statements of the former bill, stated to the following effect:—

That in the session of 1852 the majority of the directors of the Oxford, Worcester, and Wolverhampton Railway Company introduced three bills into Parliament, for the purpose of severing the undertaking of that company from all connection with the

\* 346 Great \* Western Railway, and establishing a new and independent line on the narrow gauge from Oxford to London. That these bills were opposed by the Great Western Railway Company, two of them rejected, and the third withdrawn. That after these rejections and withdrawal, a correspondence took place

between Messrs. Russell and Rushout, the chairmen of the Great Western Railway Company and the Oxford, Worcester, and Wolverhampton Railway Company, commencing on the 28d of August, 1853, by a letter from the former chairman; which, after giving a narrative of what had occurred, according to the views of the writer, proceeded thus: "Upon a review of all these facts, which can admit of no mistake, this board, feeling it to be the common interest of both companies, and their duty to the public, lost no time, after the close of the session, in requesting their directors to tender to your board the offer of our best services, in any way the most acceptable to yourselves, for resuming and renewing amicable arrangements to lease or work your line in continuation of the Great Western at Oxford, and even to relieve you from the onerous charges of finding capital to provide locomotive stock in the existing financial position of your company."

That in answer to this letter Mr. Rushout, on the 27th of August, 1852, wrote as follows: "A copy of your letter of August 28d was forwarded to me. I am sure that it will meet with that attention which it so well deserves." That on the 5th of November, 1852, Mr. Rushout wrote to Mr. Russell as follows: "My colleagues deputed to a committee the consideration of your letter of the 23d of August last, which committee, owing to many operating causes which I will not enumerate, have but recently authorized the nature of my reply. My board think it inconsistent with their position \* to enter into a correspond- \* 347  
ence with a view of refuting your assertions that they have endeavoured to 'extricate the company from all previous engagements,' or of determining whether you have correctly described their parliamentary applications of 1852. They have simply endeavoured, by means in their estimation honourable, and advantageous alike to the public and to the proprietors, to place their company in a position to earn an income in return for its outlay; and they think that the grant by Mr Lascelles' committee of the bill, promoted by the London and North-Western Company, for a junction between the lines of that company and of this, evinced the inclination of the committee to give them the only relief which they thought they could, under the circumstances, at that time grant. Believing this most fully, and that the renewal of a course similar to that taken in the last session of Parliament is the only one which can be satisfactory to the proprietors of this com-

pany, and conformable to the engagements of the directors, they have made their arrangements for pursuing such a course, and will endeavour to bring it to a successful issue. They cannot see the possibility of reconciling an amicable working of their line by the Great Western Company with the pursuit of this course, and they therefore decline to accept it; but they have no disinclination to meet your directors with the view of arranging a transfer of traffic at Wolvercot, until more perfect arrangements for it can be made."

The bill then set out a long correspondence upon the subject of proposed traffic arrangements, in the course of which Mr. Smith, the secretary of the Oxford, Worcester, and Wolverhampton Railway Company, wrote, on the 30th of December, 1852, to Mr. Saunders,

the secretary of the Great Western Railway Company, a  
\* 348 \* letter, the material parts of which were as follows:

"My directors understand that your board declines to receive, at Wolvercot, traffic brought there in this company's narrow gauge carriages, on the plea that the parliamentary engagements of the company require its line to be a broad gauge line only, and that the laying down of the narrow, in addition to the broad gauge, or that the working of the narrow gauge, is a violation of its parliamentary engagements. If so, my directors are at issue with yours. They think that—Lord CRANWORTH having decided that they are perfectly justified, under their parliamentary obligations, in laying the narrow gauge rails—they cannot be held to exceed those obligations in working the line with their own narrow gauge plant. If your board really think otherwise, and the almost offensive language used by you forbids any other supposition, they had better appeal without delay to the tribunals of the country, to test the accuracy or inaccuracy of the views respectively entertained. My directors decline any temporary or permanent arrangement with yours on the terms you dictate."

Mr. Saunders replied by a letter, dated the 31st of December, 1852, which, after disclaiming any intentional want of courtesy, was as follows: "My directors mean to adopt the course you have advised, of appealing, without delay, to a proper tribunal, to test the accuracy of the views entertained with respect to the parliamentary obligations and duty of the Oxford, Worcester, and Wolverhampton Company."

The bill then stated that the Oxford, Worcester, and Wolver-

hampton Railway Company some time since opened their line of railway in portions; first from Worcester to Abbotswood, then from Worcester to Stoke Prior, then from Droitwich to Stourbridge, then from \* Abbotswood southward to Eves- \* 349 ham; and that they had recently, on or about the 20th of

December, 1852, opened for traffic their line from Stourbridge northwards to Dudley, and that they intended in the month of January, 1853, as stated by Mr. Smith, and as the fact was, to open for traffic a further part of their line; namely, from Evesham south to Wolvercot, to join the Great Western Railway there. That the course of proceedings so adopted by the Oxford, Worcester, and Wolverhampton Railway Company, as aforesaid, was contrary to the provisions and express enactments of the aforesaid Acts of Parliament under which the Oxford, Worcester, and Wolverhampton Railway Company was constituted and established as aforesaid, and an attempt to evade the provisions of the same Acts; and that such proceedings were wholly illegal and beyond the powers of the company, and that the same were adverse to the true interests of the shareholders of the Oxford, Worcester, and Wolverhampton Railway Company, and to the shareholders of the Great Western Railway Company, and if permitted to go on would occasion irreparable injury to each of the companies. That a single line of mixed gauge from Oxford or Wolvercot to Worcester, Wolverhampton, or even to Dudley, could not be worked without imminent danger to the public who should travel by it; and that the use of the broad gauge rails on such a line would be in fact impracticable if the line were worked by the Oxford, Worcester, and Wolverhampton Railway Company under the circumstances thereinbefore stated. That the funds, resources, and credit of the Oxford, Worcester, and Wolverhampton Railway Company were not more than sufficient to construct the line of the Oxford, Worcester, and Wolverhampton Railway, so as to enable the same to be worked continuously with the Great Western Railway throughout

\* its entire length, with additional rails to the north of \* 350 Abbotswood aforesaid; and that in case the company should be permitted in the first instance to complete the line on the narrow gauge, then the company would not have sufficient funds to enable them to lay rails throughout the entire length of the line upon the broad gauge also, or to construct their line so as that the



same might be worked continuously with the Great Western Railway.

The bill prayed, among other things, for an injunction to restrain the Oxford, Worcester, and Wolverhampton Railway Company, their directors, servants, and agents — 1. From opening or using, or permitting to be opened or used, on the narrow gauge, the railway from Evesham to Wolvercot aforesaid, or any part thereof, or any part of their line of railway not already opened and in use for traffic as aforesaid, unless and until they should have formed their said railway, throughout its entire length, on the broad gauge, and so as to enable the same to be worked continuously with the Great Western Railway, together with additional rails on the narrow gauge to the north of Abbotswood aforesaid, and side lines pursuant to the Acts of Parliament, and unless and until the line of railway should have, throughout its length, been constructed and completed to the satisfaction of the engineer for the time being of the plaintiffs, the Great Western Railway Company.

2. From taking, or causing to be taken, any step, or doing, or causing to be done, any act, matter, or thing, and in particular from expending, or causing or permitting to be expended, the moneys or funds of the said company, or any part thereof, or any moneys borrowed, or to be borrowed, by or on the credit of \* 351 the last-mentioned \* company, or in any way pledging or using the credit of the last-mentioned company in or towards or for the purpose of forming their line of railway in the first instance otherwise than on the broad gauge throughout its entire length, and so as to enable the same to be worked continuously with the Great Western Railway, together with additional rails to the north of Abbotswood aforesaid, and side lines, pursuant to the provisions of the said Acts of Parliament.

3. From constructing or using any of the works of the said railway, or laying down, or using, or permitting to be used, the rails thereof, or any of them, otherwise than in conformity with the aforesaid Acts of Parliament, and the true spirit and intent thereof.

*The Solicitor-General* and *Mr. G. L. Russell* supported the motions.

*Mr. Rolt*, *Mr. Malins* and *Mr. Jessell* opposed them.

*The Solicitor-General* replied.

The arguments appear sufficiently from the judgments.

March 16.

**THE LORD JUSTICE KNIGHT BRUCE.** — It is not now to be determined what order or decree, whether of dismissal or otherwise, if these causes were or shall be before the Court for hearing, it would or will be proper to make. We are dealing with interlocutory motions only, one under each of the three bills before us. The first of these bills was filed not sooner than March, 1852; the second, not sooner than January, 1853. Of two of the motions, notice was given only in January, 1853. One is a motion by way of appeal from an interlocutory \* order, made by \* 352 Sir JAMES PARKER in April, 1852, or perhaps rather a refusal in April, 1852, on the part of that learned Judge to make an interlocutory order. An answer has not been filed or waived in any one of the causes, as I collect; nor have the defendants, as I understand, been brought into contempt. Among the grounds of resistance to each motion, but especially to the two first, has been that of acquiescence or delay imputed to the plaintiffs, whose motions the three are respectively.

With this particular ground I propose to deal first; and, considering the time of filing the second bill, I have not the least hesitation in saying that the motion under it ought necessarily to fail, if the appeal motion ought to do so by reason of acquiescence or delay. The Great Western Railway Company, it is to be remembered, are plaintiffs in the first cause, suing with some individuals on behalf of themselves and others, and are the sole plaintiffs in the second and third causes. But the Attorney-General is neither an informant nor a defendant in any one of the three. Whether if he had been here it would have made any material difference, I need not give an opinion.

As to the appeal motion, I assume for the present purpose, that is to say, merely for the purpose of the point of acquiescence or delay, that the true construction of the Act of 1845 is the plaintiffs' construction, and would, had they proceeded with diligence and uniformity of purpose, have entitled them to an injunction, even upon an interlocutory application. But the bill of March, 1852, was filed after the plaintiffs had been for eleven or

twelve months, or more, in possession of direct notice of  
 \* 358 the defendants' intention to deal with \* their railway in a manner upon the foundation of the wrongfulness, or supposed wrongfulness, of which the bills proceed; and the order appealed from having been made on the 21st of April, and notice of the appeal motion not given until January, the defendants, during the whole of the intermediate period, proceeded as before with their works, and incurred necessarily about them (as before) very considerable expense.

Perhaps the mere delay between April and January would have been, without acquiescence (so far as there may be delay without acquiescence), sufficient to dispose of the appeal. But I am of opinion upon the evidence, that during the greater part, if not the whole, of the interval, there was acquiescence on the plaintiffs' part, — conduct, I mean, of the plaintiffs, from which the defendants were entitled to infer that the plaintiffs did not mean to appeal from the Vice-Chancellor's order, or refusal to make an order, whichever term ought to be used.

The case is not before us of the defendants having intended in January last or now intending to conduct themselves or their business in a manner intimated by Sir JAMES PARKER to be, in his opinion, wrongful. I collect his opinion to have been that they might well do what it is the object of the two first of these motions to prevent; namely, might well (so far, at least, as the Act of 1845 is concerned) open and use their railway, along its whole course, with a double line of rails, on the narrow gauge, and either a double or a single line of rails of mixed gauge. I do not assert or deny that to be a view of the Act of 1845, in which I concur.

It has been argued, that during a time, commencing  
 \* 354 \* before the 21st of April last, and ending with or in June, certain bills bearing (or which, if passed, would have borne) on the disputes between the parties, were pending in Parliament, and that their pendency so long ought to relieve the plaintiffs from any imputation (so far as that time extends) of acquiescence or delay. I am unable, however, so to view the matter. It appears to me that for every present purpose that time must count against the plaintiffs, as much as if the defeated bills had been finally defeated in April last. Neither party, I think, had a right, in any sense at present material, to speculate upon the fate of any one of the bills. But I may notice (as a circum-

stance not unfavourable to the defendants on the present occasion) the passing in June, 1852, of an Act frequently mentioned during the argument. The correspondence subsequent to the 21st of April last appears to have commenced not earlier than the 23d of August. There is not any thing in that correspondence equivalent, in my judgment, to an intimation that there was any intention of appealing against the order or refusal of Sir JAMES PARKER, nor do I find any evidence of an intimation in any sense or way of such an intention before November, 1852.

The plaintiffs' counsel have appeared to place some reliance on the orders obtained previously to March, 1852, in the causes of *Beman v. Rufford* (a) (where one of the plaintiffs here was a plaintiff), and the *Great Western Railway Company v. Rushout*, (b) — orders, however, which seem to me to have a bearing possibly for, but certainly not against, the defendants on this occasion. No application in either of those suits is before us, and I wish to be understood as giving no opinion touching any thing said or done in either.

\* It has been urged, too, on behalf of the plaintiffs, that \* 355 no part of the defendants' works and expenditure already made is or will be useless to them, or is now contended by the plaintiffs to be unlawful or improper in any other sense than this, that a portion of them should have been preceded by works not yet done, which the plaintiffs contend should be done by the defendants before they can properly proceed to execute or complete the works that they claim a right to complete or execute in the first instance. The defendants say, however (and as it seems to me not without foundation), that upon the assumption of the plaintiffs being right in their view of the statute of 1845, the defendants have been laying out large sums of money in an order and a manner which have (very prejudicially to themselves) diminished their means of doing what the plaintiffs require; and would, by the interference of the Court, with respect to the order or manner of the defendants' future works as desired by the plaintiffs, be materially embarrassed and prejudicially interrupted in the prosecution of designs which, during many months, the defendants have been allowed by the plaintiffs to prosecute at great expense, under the notion that the defendants were entitled to

(a) 1 Sim. N. S. 550.

(b) 5 De G. &amp; S. 290.

prosecute them. It appears to me upon principle equally, and the authorities, including a case of which my learned brother has reminded me, — the *Birmingham Canal Company v. Lloyd*, (a) — that the plaintiffs had not perhaps before, but have certainly not since, the 21st of April last, so conducted themselves as to be now entitled to an injunction upon the appeal motion, or upon the original motion of January of this year, whatever may be the true meaning of the 38th section of the Act of 1845; for, beyond the question of the true construction of the words “worked \* 356 continuously,” there is not substantially \* any case of dissatisfaction, upon the part of Mr. Brunel, so far as the 38th section is concerned.

In all that I have said with respect to the two first motions, the ground on which I have proceeded, is, I repeat, the acquiescence or delay of the plaintiffs. But it seems not improper to add that were this ground fit to be wholly disregarded, I should (probably or certainly) still think the plaintiffs entitled (if to any injunction upon the two first motions, or either of them) to no other injunction than as to future expenditure. The 131st section of the Act of 1845, under which the Board of Trade has made an order on the Great Western Railway Company (an order, that either from inability to obey it or otherwise, they have not obeyed), seems to me to throw serious difficulty in the way of the parties making those motions. The defendants under the Act passed in June, 1852, have yet more than a year allowed them by Parliament for the completion of their works. They profess (and I believe not fraudulently, not dishonestly) an intention to complete, before the end of the two years allowed by the last Act, a double line of mixed gauge along the whole course, along which the plaintiffs require that they should make a double line of broad gauge. I am not satisfied that this alleged intention is of impossible or even improbable execution. And if it is not of impossible or improbable execution, and the defendants are not acting (as, whether right or wrong, they are not, in my opinion, shown to be acting) *malâ fide*, I do not see why (acquiescence or no acquiescence, delay or no delay) the Court should now, upon either of the two first motions, interfere, unless possibly, as I have said, with respect to future expenditure. But if the alleged intention is of impossible or im-

probable execution, neither then do I (acquiescence or no acquiescence, delay or no delay) \* perceive sufficient reason \* 357 for any other interposition upon those two motions. The Attorney-General, I repeat, is not here. A single line of mixed gauge, now in active progress, is likely to be completed before the next month ; and treating this as a mere question of contract between subject and subject relating to property, and considering the contract as formed by the 38th section of the Act of 1845 (which, whatever may be the true reading of that section, is now to be taken in conjunction with the Act of June, 1852), I must if asked what fair purpose in such a case can be fairly advanced by stopping that single line now, or by preventing the use of it, or of the lines of narrow gauge, answer in my opinion none.

THE LORD JUSTICE TURNER. — The original motion seeks for an injunction to restrain the opening or using of the narrow gauge line from Evesham to Wolvercot, or any part of the line not already opened, till the whole line of the Oxford, Worcester, and Wolverhampton Railway is formed throughout its entire length on the broad gauge, and till that line is completed throughout to the satisfaction of the plaintiffs' engineer ; secondly, to restrain any act or expenditure in forming the Oxford, Worcester, and Wolverhampton Railway in the first instance, otherwise than on the broad gauge throughout ; and, thirdly, to restrain the construction of the works or laying down the rails otherwise than in conformity with the Acts of Parliament.

The appeal motion seeks, first, to restrain any act or expenditure in constructing the line in the first instance, — that is, the line of the Oxford, Worcester, and Wolverhampton Railway, — otherwise than on the broad gauge throughout ; secondly, and particularly, to restrain the \* laying down the narrow gauge \* 358 south of Abbotswood ; thirdly, to restrain the laying down of the narrow gauge north of Abbotswood till the broad gauge was laid through the entire length ; fourthly, to restrain the making any part of the line till the broad gauge is laid through the entire length ; and, fifthly, to restrain the construction of the works or laying down the rails otherwise than in conformity with the Acts.

The first point of the original motion, therefore, corresponds to the fourth point of the appeal motion, with this difference only, that the original motion goes beyond the appeal motion to the

extent of asking that the injunction may be in force until the line is completed to the satisfaction of the Great Western Company's engineer. The second point of the original motion corresponds with the first point of the appeal motion ; and the third point of the original motion corresponds with the fifth point of the appeal motion.

These two motions may be considered separately, or in connection, the one with the other ; and I will first deal with the original motion without reference to the appeal motion, and upon the assumption that the questions between the parties had never before been in any shape submitted for the opinion of the Court. In this view of the case, the right of the plaintiffs to call for the interference of the Court must, as it seems to me, depend upon the construction of the Act of Parliament, by which the Oxford, Worcester, and Wolverhampton Company was incorporated, and on the effect which is due to what has occurred since the passing of that Act. Now, whatever may be the construction of the Act, the plaintiffs have had the same right to insist upon that construction

from the day when the Act was passed as they have at the \* 359 present time. The construction they \* put upon the Act is, that the Oxford, Worcester, and Wolverhampton Company were not authorized by it to lay the narrow gauge south of Abbotswood ; or, at all events, that they were bound in the first instance to lay a double line of broad gauge throughout the whole length of the railway ; and the case cannot be put more favourably for them than to assume this construction to be correct. Assuming it, then, to be so, how does this case stand upon the evidence before us, in the view, which we are now considering, of there having been no previous application to the Court ? It stands thus, — that from the month of March, 1852, the Oxford, Worcester, and Wolverhampton Company have been proceeding to lay down the narrow gauge south of Abbotswood, at the same time laying down a single line only of broad gauge, and no application has been made to this Court to prevent them. Is this a case in which the Court ought now to interfere to prevent the opening of the single line of broad and narrow, or, as it is termed, mixed gauge ? I am of opinion that it is not.

Where the summary interference of this Court is invoked, in cases of this nature, it must be invoked promptly.<sup>1</sup> Parties who

<sup>1</sup> See 2 Dan. Ch. Pr. (4th Am. ed.) 1639, 1640, 1663, and cases in notes to this point ; *Buxton v. James*, 5 De G. & S. 80, 84 ; *Coles v. Sims*, Kay, 56, 70 ;

have lain by and permitted a large expenditure to be made, in contravention of the rights for which they contend, cannot call upon this Court for its summary interference.<sup>1</sup> The jurisdiction to interfere is purely equitable, and it must be governed by equitable principles. One of the first of those principles is that parties coming into equity must do equity; and this principle more than reaches to cases of this description. If parties cannot come into equity without submitting to do equity, *a fortiori* they cannot come for the summary interference of the Court when their conduct before coming has been such as to prevent equity being done.

\* This view of the case was attempted to be met by the \* 360 suggestion that the plaintiffs had throughout objected to the narrow gauge being laid south of Abbotswood; but that objection alone is not in my opinion sufficient. There was objection and even threat of an action in the *Birmingham Canal Company v. Lloyd. (a)* There the canal company had the use of certain reservoirs; a person who was working in an adjoining coal-mine intended to make, and gave notice to the company that he would make a level in his mine, the effect of which would be to affect the reservoirs which belonged to the plaintiffs, the Birmingham Canal Company. The Birmingham Canal Company upon that gave notice that if he did they would bring an action; and then they brought no action, but permitted the defendant to go on laying out his money to the extent of only 2000*l.* in making the level for the purposes of his mine. Upon that an application was made to this Court for an injunction. Lord ELDON puts it that he rested the case entirely on the ground of delay. He says: "Assuming for the present purpose this piece of water, called Broadwater, to be a reservoir within this Act of Parliament, the plaintiffs must establish their right to damages at law, before I ought to grant this injunction. I proceed here upon the circumstances of delay. The defendants having, in pursuance of their promise to give six months' notice of beginning to work their mines, given notice in April, 1810, expressly mentioning their purpose to open the Sough, the company having given a counter-

5 De G., M. & G. 1; 18 Jur. 683, 685; *Gordon v. Cheltenham Railway Co.*, 5 Beav. 229, 237.

(a) 18 Ves. 515.

<sup>1</sup> *Fuller v. Melrose*, 1 Allen, 166; *Tash v. Adams*, 10 Cush. 252.



notice, that they would in that case seek damages at law, and, having a right to apply promptly to this Court to prevent the act, instead of taking that course, permit the defendants to expend 2000*l.* in proceeding towards getting coal by erecting fire-  
 \* 361 engines, &c.; and, when they are about \* to get coal, the plaintiffs come for an injunction. They ought to have commenced their opposition when they could have done so with justice;" and accordingly upon that ground, and that ground alone, Lord ELDON in that case refused the injunction.

Now there the expenditure was very far short of what the expenditure in the present case must necessarily have been. It is true that there was in that case greater lapse of time than there has been in the present, but the weight which is due to lapse of time must, as I apprehend, in a great degree depend upon the extent of the expenditure. It was then said, however, that the proper time for the application to the Court was upon the proposed opening of the line; but this position seems to me to be equally untenable in the point of view now under consideration, for the plaintiffs' contention has throughout been that there was no right to lay the narrow gauge south of Abbotswood, and upon the assumption of that point having been brought before the Court before the expenditure in laying the narrow gauge was incurred, and having been maintained, the money so expended might have been applied to what, according to the plaintiffs' construction, was a proper purpose, and the position of the defendants would then have been wholly different.

Taking this case, therefore, to rest upon the original motion, I am clearly of opinion that so far as respects the first and third heads of the application, it ought to be refused. It is then to be considered whether, upon these points, the case is differed in favour of the plaintiffs, by the original motion and the appeal motion being taken in connection with each other. It does not appear to me that it is, and, on the contrary, I think the plaintiffs' case is placed in a less favourable point of view by the  
 \* 362 \* two motions being taken together. The appeal motion is from a judgment pronounced by the late Vice-Chancellor PARKER, on the 21st of April, 1852, and in that judgment he expressed himself thus (a): "The first question is, being bound

(a) 5 De G. & S. 447, 448.

to lay down the broad gauge, are they at liberty also to lay down the narrow gauge line throughout? It appears to me that they are. The Act of Parliament which prescribes that the railway shall be formed of such gauge, and according to such mode of construction, as will admit of being worked continuously with the Great Western, does not, as it seems to me, prohibit its being laid down, so as to be adapted to another mode of working as well, if it suits the interests of this railway company so to do. This view of the case appears to me to be entirely in accordance with Lord CRANWORTH's judgment in *Beman v. Rufford*. (a) The next question is, are they bound to lay down a double line throughout? I do not think that they are. Engineering questions may arise as to whether it is advisable to lay down a double line, but there is nothing in the Act of Parliament to restrain them from laying down a single line, if they think fit. Next, are they at liberty to lay down upon a mixed gauge, if they think fit? I think they are. I see nothing to prevent their line being a line capable of being worked continuously with the broad gauge line, adapted so as to be traversable by carriages to be run upon a narrow gauge line; so that it appears to me, if, when the railway shall be completed, there shall be a single line of railway the whole distance from Wolverhampton to Wolvercot, admitting of being worked continuously with the Great Western, and with additional rails between Abbotswood and the Grand Junction, capable, with those additional rails, of being worked by a narrow gauge line, that the company are not bound to do more. It appears to me they have power to construct their line upon the narrow gauge between Abbotswood and Wolvercot, and that such a line will be a railway made in accordance with the provisions of this Act of Parliament."

The defendants, therefore, were justified in considering that they had the right to lay down the narrow gauge south of Abbotswood; that they were not bound to lay down the double line of broad gauge; and that the requisitions of the Act would be satisfied, if, when the line was completed and open to Wolvercot, there was a line capable of being worked continuously with the Great Western, which, in the opinion of the Vice-Chancellor, a single line of mixed gauge would be; and the plaintiffs, by not having

appealed against the Vice-Chancellor's order, have encouraged the defendants to believe that they did not mean to dispute those conclusions.

It was urged on the part of the plaintiffs that, whilst the suit was pending, the delay in appealing could not operate to their prejudice; but I cannot agree to that proposition. Even where a decree has been made, and an appeal is brought long after the decree, the Court always leans against the appeal, and this principle applies, in my opinion, much more strongly to the case of an interlocutory application.

Another ground which, as it seems to me, has an important bearing on these parts of the motions is the question of comparative mischief. On the one hand, the injury to the defendants cannot but be great, if the line be not permitted to be opened. On the other hand, I see no injury to the Great Western by permitting it to be opened. If, as they contend, the whole  
 \* 364 \* income and property of the defendants ought to be applied in making the double broad gauge line, they will rather be benefited by the probable increase of that income and property from the opening of the line.

In every view of this case, therefore, I think that the first part of the original motion and the fourth part of the appeal motion (the parts of both motions which refer to the opening of the line) ought to be refused. For the same reasons, the third part of the original motion and the fifth part of the appeal motion (the parts which refer to the construction of the works according to the Act of Parliament) must also, as I think, be refused; and the second and third parts of the appeal motion (which go to restraining the narrow gauge being laid to the south of Abbotswood, or to the north of Abbotswood till the broad gauge is laid through the entire length) seem to me to fail upon the same grounds.

It is, perhaps, hardly necessary to observe that the observations which have been made upon the appeal motion, as taken in connection with the original motion, apply with at least equal force to the appeal motion if separately considered.

We have, then, only to consider, with reference to these two motions, the second branch of the original motion and the first branch of the appeal motion (the parts which relate to the question of restraining any expenditure for forming the line in the first instance otherwise than on the broad gauge); and this part

of the case admits, perhaps, of more doubt with reference to future expenditure; but much of what has been already said applies to this point also. It is impossible to say what the position of the defendants would have been if the plaintiffs had come earlier to prevent the expenditure \* which \* 365 has been incurred upon the narrow gauge. The broad gauge might then have been wholly or nearly completed, and funds might thus have been created for laying down the narrow gauge, in lieu of the funds, the application of which to that purpose is now sought to be restrained. The position of the defendants, therefore, may have been materially altered, by the delay on the part of the plaintiffs, assuming their construction of the Act to be correct, and upon this ground, I think, they must be held to have lost any equity which they might have had, for the summary interference of this Court to restrain the application of the funds, — at least, so long as the course which the defendants have pursued since the judgment of the Vice-Chancellor, of laying down the broad gauge with the narrow gauge, is continued to be pursued, and no undue preference of the narrow to the broad gauge is given in the expenditure.

Upon the whole, therefore, I think the two first motions must be refused.

The order, therefore, upon these two motions, will be to refuse them with costs, without prejudice to any question in the causes, or either of them, or to any proceedings at law which the plaintiffs may be advised to take, and with liberty to the plaintiffs to take any such proceedings as they may be advised.

1853. May 4, 7, 23, 25. June 8. Before the Lord Chancellor Lord CRAWFORD.

A testator by his will devised real estate to trustees in trust to receive the rents during the life or lives of the survivor of all the children which M. G. had or should have, and, after certain deductions, to apply them in the support of M. G. and in the maintenance and education of all her children which she should from time to time have living, in equal shares between her and them.

The will then contained further trusts providing that after all the children of M. G. mentioned in the above devise and the youngest of them attained twenty-one, the rents should be divided among the said children, and the issue of any of them that should happen to die leaving issue, equally, and the survivors and survivor of them until the death of the longest liver of the children, and, after the death of the longest liver, then to convey the estates to the eldest living grandson of M. G.

*Held*, that a trust was created for the benefit of the children of M. G. who were in a state of minority, that it included children born after the death of the testator, and was for all children who might be alive from time to time until the period when the youngest of the living children of M. G. should attain twenty-one.

*Held*, also, that the further trust substituting the issue for the parent, and the ultimate trust to convey the estates were void for remoteness.<sup>1</sup>

A decree to execute the trusts of a will does not make valid trusts which on the face of the will are bad.

WILLIAM TIPPPELL, by his will dated the 24th October, 1792, gave and devised all his messuages, lands, tenements, tithes, and real estate whatsoever, as well copyhold and freehold as leasehold, situate in the counties of Suffolk, Essex, and Middlesex, or elsewhere in the kingdom of Great Britain, unto William Bazire and Jonathan Tippell the younger, to hold to them, their heirs, executors, administrators, and assigns upon the following trusts, that is to say,—"Upon trust that they, the said W. Bazire and J. Tippell, or such new or other trustees or trustees to be appointed as hereinafter mentioned, do and shall receive and take all the rents, issues, and profits of all my said messuages, lands, tenements, hereditaments, and real estate, during the lives and the life of the survivor or longer liver of all the children which my daughter Mary, the wife of John Gooch of the city of London, ship-broker, hath or shall have, and pay and apply the same in manner following, that is to say, first in keeping the houses and buildings belonging to the said estates in proper tenantable repair, and in discharging the annuities hereinafter mentioned, and the

\* 367 \* clear net proceeds of such rents, after the above deductions, and after deducting all expenses of my trustees and all reasonable allowances to them for their care and management of my said estates and attending the trusts hereby reposed in them which I empower them or either of them from time to time to deduct and take, shall and will pay and apply in the support

<sup>1</sup> See *Seaman v. Wood*, 22 Beav. 591; *Salmon v. Salmon*, 29 Beav. 27; *Holloway v. Webber*, L. R. 6 Eq. 523.

of her, my said daughter, and in the maintenance, education, and bringing up of all her children which she shall from time to time have living, in equal shares between her and them ; that is, one equal part or share thereof to and for her my said daughter's own sole use and benefit, and each child's equal part and share for his and her use, or so much thereof and in such manner as my said trustees shall think proper and judge necessary, and in which I wish my daughter to be consulted, save and except, and my will and mind is, that from and after any of her children shall attain the age of twenty-one years during the minority of her youngest living child, that the part or share of such child or children attaining the said age of twenty-one years shall from thenceforth be paid to him, her, or them respectively, to and for his, her, or their own use and disposal ; and when the youngest of my grandchildren which shall live to attain the age of twenty-one years shall have arrived at that age, then I will and direct that such savings or overplus of the said clear rents and profits (if any) as shall be then in the hands of the trustees unexpended for the purposes aforesaid, and the rents which shall be then due up to that time, shall be paid and divided to and amongst my said grandchildren that shall be then living, equally, share and share alike ; and my will and mind is that in case any of my grandchildren by my said daughter shall happen to depart this life under the age of twenty-one years without leaving any issue of his, her, or their body or bodies lawfully begotten then living, then that the part and share, \* parts and shares, of the said clear rents and profits \* 368 of such grandchild and children so dying under age and without issue as aforesaid shall be paid and applied by my said trustees to and amongst my said daughter and the survivors or others of my grandchildren by her in equal shares, as to my said daughter's share thereof to her for her own use and benefit, and as to her children's share to and for their separate and respective support and benefit in such manner as my said trustees shall think proper during their respective minorities, or otherwise to be paid to them at their respective ages of twenty-one years ; but in case any of my said grandchildren shall depart this life under the age of twenty-one years leaving issue of his, her, or their body or bodies lawfully begotten, my will and mind is that such issue shall be entitled to the part or share of the said clear rents and profits its father or mother would have been entitled unto if living, to be

paid and applied in like manner for the support and benefit of such issue; and in case my said daughter Mary shall happen to depart this life before all my grandchildren by her shall have attained the age of twenty-one years, then my will and mind is that her part and share of the said clear rents and profits shall from her decease go to and be paid and applied for the use and benefit of all her children and their issue until the youngest of such children shall attain twenty-one, in equal shares, as an increase of and with their respective parts and shares of such rents and profits, and in like manner and in such proportions as such shares are hereinbefore directed to be paid and applied to and for their respective use and benefit; and in case my said daughter, Mary Gooch, shall happen to be living at the time the youngest of my grandchildren by her shall attain the age of twenty-one years, then upon trust" —

\* 369 [The testator here directed that W. Bazire and J. \* Tippell, or such new or other trustee or trustees to be appointed as thereafter mentioned, should by deed charge all his real estates with the payment of an annuity of 100*l.* unto his said daughter for her life in manner therein mentioned, the first payment thereof to begin on which of the days of payment should next and first happen after such his youngest grandchild should attain the age of twenty-one years; and, further, that W. Bazire and J. Tippell, and such new or other trustee or trustees, should, in case his brother Thomas Tippell and his sister E. Seawater, or either of them, should be also then living, by a like or other deed or deeds charge his real estates with one other annuity of 20*l.* apiece to each of them in manner therein mentioned, the first payment thereof to begin and be made on which of the days of payment should first and next happen after his youngest grandchild should attain the age of twenty-one years.]

" And from and immediately after all my grandchildren by my said daughter, and the youngest of them, shall have attained the said age of twenty-one years, then I will and direct that the clear rents and profits of my said real estates accruing from that time, after the aforementioned deductions are made and the aforementioned annuities, so long as the same shall be payable by virtue of this my will, are paid and satisfied, shall be paid and applied by my

aforesaid devisees in trust, or by such new or other trustee or trustees to be appointed as hereafter mentioned, to and amongst my said grandchildren and the issue of any of them that shall happen to die leaving issue, equally share and share alike, and to the survivors and survivor of them until the decease of the longest liver of my said grandchildren, provided that the issue of any such child or children dying in that time and leaving issue shall only be entitled to such part or share of the said clear rents and profits as its father \* or mother would have been entitled \* 370 unto if living, and the part or share of such issue shall be applied in the maintenance and education thereof by the trustees for the time being as they or the guardians of such issue shall think proper during the minority of such issue.

“ And from and immediately after the decease of the survivor or longest liver of my said grandchildren, then upon trust that they, my said devisees in trust, or the trustees or trustee for the time being, do and shall convey, surrender, settle, and assure all that my messuage, farm lands, tithes, hereditaments, and real estate situate, lying, and being in Sutton in the said county of Suffolk or towns adjoining, now in the use and occupation of Mr. William Simpson, his assigns or under-tenants, with their appurtenances, but subject and charged with the payment of a proportionable part of the annuities aforementioned, as the annuitants thereof shall be then living, according to the value of the said last-devised estate, with the residue of my real estate, and such proportion to be ascertained and set by my then said trustees, unto such son of any one of my said grandchildren as shall at such decease of the survivor or longer liver of them be then the eldest living grandson of my said daughter and his heirs for ever ; provided always, and my will and mind is, that such eldest grandson of my said daughter shall take and continue to use the surname of Tippell and the arms of the Tippell family ; and in case he shall neglect or refuse to take and continue to use the surname and arms of Tippell, then I give and devise the said estates and premises, so devised to such eldest grandson of my said daughter, unto the next eldest of my said daughter's grandsons, then living, who shall take and continue to use the said name and arms of Tippell as aforesaid, to hold to him and his heirs for ever : and all the residue of my real estate whatsoever \* and wheresoever not hereinbefore otherwise \* 371 disposed of, subject to and charged with the payment of the



residue of the said annuities, I will and direct shall be sold and disposed of by the then trustees or trustee thereof, as soon as conveniently can be after the decease of the longest liver or survivor of my said grandchildren, to any person or persons whomsoever for the best price or prices that may be gotten for the same; and the moneys arising by sale thereof, and from the rents and profits thereof, from the decease of such surviving grandchild until such sale, I give and bequeath unto all and every my (a) grandchildren the children of my daughter, (a) whether male or female, other than and except such eldest grandson of my said daughter who will be entitled to my said Sutton estate by virtue of the devise aforementioned as shall be living at the decease of the survivor of my grandchildren, equally to be divided between them share and share alike."

And the testator by his will, after bequeathing divers pecuniary legacies, and directing that the fines and fees for the admission of his trustees to his said copyhold estates should be paid out of his personal estate, gave all the residue of his personal estate after deducting all expenses and reasonable allowances to his said trustees, and paying all his debts, legacies, funeral and testamentary expenses, and the fines and fees of admission of his said trustees to his said copyhold estates, to his said trustees, in trust to apply and invest the same at interest on public or private real securities in their or one of their names until his youngest grandchild which should live to attain the age of twenty-one years should have attained that age, and out of the interest and dividends thereof to pay unto his said brother \* 372 and sister T. Tippell and E. Seawater respectively \*an annuity of 20l. each until his youngest grandchild should attain the age of twenty-one years, or until the annuities thereinbefore made payable to his said brother and sister out of his real estate should commence, and to add the residue of such interest, dividends, and produce, arising from his personal estate, to the clear rents and profits arising from his real estates, to be considered as a consolidated fund, and applied therewith for the benefit of his said daughter and her children and their respective issue, in like manner as such clear rents and profits were thereinbefore directed to be applied during the minority of his said youngest grandchild;

(a) It was admitted that these words were to be read "great-grandchildren the grandchildren of my daughter."

and upon such youngest grandchild attaining the age of twenty-one years, he gave and bequeathed the principal money unto and amongst his said daughter, in case she should be then living, and her children, and if she should be then dead then unto her said children and the issue of any of them that should be then dead, leaving issue, in equal parts, shares, and proportions, save only and except that such issue of his said daughter's children should be entitled only to the part or share of such principal money as its father or mother would have been entitled unto if living. And the testator declared his will to be that, if the part or share of his said daughter's children of the aforesaid clear rents, interest, produce, and profits arising from his real estate and overplus of his personal estate should be more than what his said daughter and trustees should think necessary to be expended and laid out in the maintenance, education, and support of such children, or putting them out to any trade or profession during their respective minorities, then the residue or surplus of such child's or children's share should be an accumulating fund in his said trustees' or executors' hands for the benefit of such child or children respectively, and should be paid to him, her, or them when the youngest of his said grandchildren \* should attain the age of twenty-one \* 373 years or at their respective ages of twenty-one years, which should last happen, together with such interest as should be made of the same in the mean time, and that such settlement and division of his personal estate and of the accumulation from the rents and profits of his real estate should be made within twelve months or at longest within fifteen months after his youngest grandchild should attain the age of twenty-one years as aforesaid, or sooner, if the same could be conveniently and fully done. And the testator appointed William Bazire and Jonathan Tippell executors of his will.

The testator died on the 18th January, 1797, leaving his daughter Mary Gooch surviving him. She had at that time, and also at the date of the will, one daughter, Mary Bazire, by her first husband, and five children by a second husband; namely, John Tippell Gooch, Ann Gooch, Maria Gooch, George Gooch, and James Gooch: she had also had another child, Harriet Gooch, born subsequently to the date of the will, on the 20th January, 1794, and who died on the 14th March, 1794. Mary Gooch died on the 4th January, 1801, without having had any other issue; and Mary

Bazire died on the 14th September, 1800, unmarried. Of the five children by the second husband, the eldest, John Tippell Gooch, died on the 14th June, 1837, leaving Watson Gooch, his eldest son, the heir-at-law both of himself and of the testator; Ann Gooch died unmarried on the 15th May, 1807; Maria Gooch married Robert Cana, and was living at the institution of the present suit, having had six children, four of whom were living and two had died in infancy; George Gooch was also living, having married and had four children, two of whom were living, two having died in infancy; James Gooch attained his age of twenty-one years on the 8th July, 1812.

\* 374 \* In 1800 a suit, *Bazire v. Tippell*, was instituted; and a decree was made in it establishing the testator's will, and directing the usual accounts. Various orders as to maintenance were also made in this suit, upon the footing of the children of Mary Gooch being entitled to the rents of the real estate for their lives, with benefit of survivorship; and in 1812 an order was made for letting the four then surviving children into possession of the real estate, and for paying to them the accumulations of the rents and the balance of the personal estate. No general declaration of rights was, however, made in the suit.

Under these circumstances James Gooch, being, as youngest son of Mary Gooch, the heir according to the custom of the manors whereof the copyhold estates of the testator with one exception were holden, and being married, but having no issue, filed his bill in 1845, by way of supplement to the suit of *Bazire v. Tippell*, praying a declaration, but subject and without prejudice to the validity of the trusts by the testator's will expressed to be declared for the lives of the children of Mary Gooch, and without disturbing the decrees and orders made in *Bazire v. Tippell*, that the trusts in the will expressed to be declared of the freehold and copyhold and leasehold estates were void in law, and that the plaintiff was entitled to the equitable inheritance in fee-simple in possession of the copyhold estates with the exception above mentioned.

On the cause coming on for hearing, a decree was made for preliminary inquiries only, and subsequently the cause was brought on upon further directions before the Master of the Rolls in 1851, (a) when his Honor made an order, dated the 1st December,

(a) Reported 14 Beav. 565.

1851, declaring that, according to the true construction of the will, the trusts therein expressed to be contained for the issue of \*the testator's grandchildren who should happen to \* 375 die leaving issue until the decease of the longest liver of his said grandchildren, were void, as being too remote; and that the trusts by the will expressed to be declared of the messuage, farm lands, tithes, hereditaments, and real estate in Sutton in the county of Suffolk, or towns adjoining, in favour of such son of any one of the grandchildren as should at the decease of the survivor or longer liver of them be then the eldest living grandson of Mary Gooch and his heirs for ever, were also void as being too remote; and that the trusts by the will expressed to be declared of the produce of the sale thereby directed to be made, after the decease of the longest liver or survivor of the grandchildren, of the residue of the testator's real estate in favour of all and every his grandchildren (meaning great-grandchildren), (a) the children (meaning grandchildren) of his daughter, whether male or female, other than and except such eldest grandson of his said daughter who would be entitled to his said Sutton estate by virtue of the devise thereinbefore mentioned, as should be living at the decease of the survivor of his (the said testator's) grandchildren, were also void as being too remote; and declaring that, subject to the life-interest of the plaintiff and the defendants George Gooch and Mrs. Cana and the survivor of them, the plaintiff was entitled, to him and his heirs in his own right as customary heir of the testator, to the copyhold parts of the Sutton estate and the residuary real estate with certain exceptions, and that subject to such life-interests the plaintiff was also entitled, as legal personal representative of the testator's daughter Mary Gooch, to the leasehold parts of the Sutton estate, and that subject to such life-interests the defendant Watson Gooch was entitled, as customary heir, to the excepted copyhold parts of the Sutton estate and of the residuary real estates; and that subject \* to such life-interests the \* 376 defendant Watson Gooch, as the heir-at-law of the testator, was entitled to the freehold parts of the Sutton estate and of the residuary real estate. (b) [And it was declared that, upon

(a) See judgment of the Master of the Rolls, 14 Beav. 580.

(b) With regard to this declaration in the order, and in reference to the observations made upon it by the Lord Chancellor in his judgment, it may be here mentioned that the Master of the Rolls at the close of the judgment deliv-

the true construction of the will and the decrees and orders in the pleadings mentioned, the plaintiff and the defendant George Gooch, or the defendant Jacoba Gooch as claiming under him, and the defendant Maria Cana, or the defendant Mary Utting as claiming under her, were entitled to the rents and profits of the Sutton estate and the residuary real estate for their lives and the life of the longest liver of them as tenants in common with benefit of survivorship between them. (a)]

\* 377 \* This order was now brought under review by a petition of appeal presented by the children of Mr. and Mrs. Cana, who, with the other parties interested, were defendants in the suit. (b)

ered by him on the 1st December, 1851, said, "I am of opinion, therefore, that I must declare that the trusts for the substitution of the issue for the parent after the youngest child of Mary Gooch attained twenty-one are void for remoteness."

The case was subsequently spoken to on minutes upon the 16th December, 1851, when considerable discussion upon the point in question took place. His Honor then observed, in effect, that according to the will a class of shares was to be ascertained when the youngest child of Mary Gooch attained twenty-one; that under the circumstances that had happened, the number of these shares was four; that the will meant that upon the death of any one of the children a process of division should take place until the death of the survivor; that thus if one child died without issue the division would be into thirds, if another died without issue it would be into halves; that if a child died leaving issue the division would still be into fourths, but that the gift thus intended by the will of the fourth to the children of the deceased child was too remote and was void, and that it would go to the heir-at-law or customary heir.

The Master of the Rolls mentioned the subject again on the 17th December, and repeated shortly the substance of what he had stated on the preceding day, adding that he was of opinion that the minutes of the proposed decree were right. By these minutes the declaration in question was, "that the plaintiff and the defendant George Gooch (or the defendant Jacoba Gooch as claiming under him) and the defendant Maria Cana (or the defendant Mary Utting as claiming under her) are now entitled in equal shares as tenants in common for the respective lives of the said James Gooch, George Gooch, and Maria Cana to three sixth parts of the rents and profits of all the messuages, &c., and residuary real estate of the testator."

(a) See preceding note.

(b) The petition of appeal did not seek to impugn that part of the order of the Master of the Rolls which dealt with the life-interests; but at the desire of the Lords Justices, before whom the case first came on to be heard on the 19th February, 1853, the parties consented to treat the appeal as being from the whole decree. The matter was subsequently fully heard by the Lords Justices, when, their Lordships not agreeing as to the mode of disposing of the case, it was ultimately, at the desire of their Lordships, brought on before the Lord Chancellor.

The argument of the case turned on several points: the principal of these was the question, whether, according to the true construction of the will, the class of children of M. Gooch included in the gift comprised only children living at the death of the testator, or whether it included after-born children as held by the Master of the Rolls: another question was, whether the substitution of the issue for the parent in the trusts as to the rents and profits after the youngest child of M. Gooch attained twenty-one was or was not void for remoteness; the plaintiff insisted that this limitation fell within the rule, because, as the person entitled to the gift over was not ascertained at the period to which it applied, the effect of it was to render the property inalienable for a period longer than the law allowed; the authorities were said to afford but little aid on this subject, as the question of remoteness \* commonly arose in reference to the ultimate gift, and not \* 378 on the effect of the intermediate limitations: and the general question resulting from the foregoing was, whether the ultimate trusts as to the Sutton estate, and as to the real estate, were or not void for remoteness.

A further point was raised on behalf of the appellants; namely, that by means of the decrees and orders made in the suit of *Bazire v. Tippell*, to which the present suit was supplementary, the parties were concluded from now questioning the validity of the ultimate limitations created by the testator's will.

*Mr. R. Palmer, Mr. Craig, and Mr. Grenside*, for the plaintiff, supported the decision of the Master of the Rolls.

*Mr. Rolt and Mr. E. F. Smith* were for Watson Gooch.

*Mr. Malins* appeared for Mr. and Mrs. Cana.

*Mr. J. Baily and Mr. Cairns* were for the appellants, the children of Mr. and Mrs. Cana.

*Mr. Daniel and Mr. Surrage* appeared for the children of George Gooch.

*Mr. Craig* replied.

The following were the authorities referred to and commented on in the argument: *Sprackling v. Ranier*, (a) *Singleton v. Gilbert*, (b) *Jee v. Audley*, (c) *Robinson v. Hardcastle*, (d) *Andrews v. Partington*, (e) *Hughes v. Hughes*, (g) *Hoste v. Pratt*, (h) *Whitbread v. Lord St. John*, (i) *Mogg v. Mogg*, (k) *Leake v. Robinson*, (l) *Brudenell v. Elwes*, (m) *Storrs v. Benbow*, (n) *Lomas v. Wright*, (o) *Sadler v. Pratt*, (p) *Butler v. Lowe*, (q) *Elliott v. Elliott*, (r) *Vanderplank v. King*, (s) *Mainwaring v. Beevor*, (t) *Blagrove v. Hancock*, (u) *Lord Dungannon v. Smith*, (v) *Greenwood v. Roberts*, (w) *M'Dermott v. Kealy*, (x) *Roper on Legacies*, vol. i. p. 47, ed. 4.

June 8.

The Lord Chancellor, after stating the will, and going minutely through the facts of the case, and referring in detail to the proceedings in *Bazire v. Tippell* and in the present suit, proceeded as follows: The important question is, What are the rights under the will? and I may here say that I rather doubt whether part of the decree under appeal was drawn up exactly in conformity with what the Master of the Rolls intended, because I do not find that some of the directions contained in it are necessarily warranted by the report of the judgment. His Honor has, very accurately, in his judgment said that the trusts may be divided into three periods: first, what he calls the minority trusts; \* 380 secondly, \* the trusts after the expiration of the minority trusts, to whatever period they were to endure; and, thirdly, the trusts that were to take effect after the determination of the second series of the trusts, namely, the conveyance of the Sutton estate to the eldest great-grandson, and the sale of the

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| (a) 1 Dick. 344.                               | (c) 1 Cox, 324.        | (e) 3 Bro. C. C. 401. |
| (b) 1 Cox, 68.                                 | (d) 2 Bro. C. C. 22.   |                       |
| (g) 3 Bro. C. C. 352, 494; S. C., 14 Ves. 256. |                        |                       |
| (h) 3 Ves. 730.                                | (g) 10 Sim. 317.       |                       |
| (i) 10 Ves. 152.                               | (r) 12 Sim. 276.       |                       |
| (k) 1 Mer. 654.                                | (s) 3 Hare, 1.         |                       |
| (l) 2 Mer. 363.                                | (t) 8 Hare, 44.        |                       |
| (m) 1 East, 442.                               | (u) 16 Sim. 371.       |                       |
| (n) 2 M. & K. 46.                              | (v) 12 Cl. & Fin. 546. |                       |
| (o) 2 M. & K. 769.                             | (w) 15 Beav. 92.       |                       |
| (p) 5 Sim. 632.                                | (x) 7 Jur. 163.        |                       |

other estates, and the division of the proceeds among the other great-grandchildren.

With respect to the minority trusts, I entirely concur with the Master of the Rolls in the conclusion at which he has arrived; namely, that they were meant, subject to the qualification I will presently mention, to include all children that the daughter then had or should thereafter have. . There was a great deal of argument as to the period at which the class was to be ascertained, and rules of construction were referred to. Such rules are very useful for guiding persons in ordinary cases; but what a testator means as to the period at which the class is to be ascertained, when he makes a bequest to all the children of a particular person, is evidently a matter as to which any positive rule must ever bend to particular circumstances, and to the particular language of the will. In the present instance I cannot entertain the least doubt that the Master of the Rolls was quite right in saying that the testator certainly contemplated children to be born after his will and after his death, and that so long as there were children to be maintained during the minority he meant those children to take the benefit of the trust: there is nothing to lead to the supposition that he meant that arbitrarily to depend on whether the child should be born after his death or before his death. My attention has been very properly called to what I believe I omitted to state; namely, that there was a child born after the date of the will, and before the testator's death: that child, according to any construction, \* would be held as intended to be let in; and \* 381 what difference it would make if the testator died the day after his will, and before the child was born, turns out to be immaterial. It seems perfectly clear that he meant that all the children of his daughter who were in a state of minority should have the benefit of the trust. Then it was said, arguing certainly quite logically, that the trust was one that must endure to the remotest period of the life of the testator's daughter, because it could not be told that she might not have another child to come into a state of minority. To this I gave the same answer that the Master of the Rolls gave in his judgment; namely, that when the testator said the trust was to include all children, he meant it should include all children up to the time when every existing child had attained twenty-one, and the contingency that after that period there might yet be another child born who would be in a



state of minority, and therefore under the necessity of having the benefit of the trust, is a contingency against which he did not provide, and which he probably never contemplated as at all likely. It could not happen, in the ordinary course of nature, unless by the death of all, or almost all, of the younger children, and then that all the elder children should have attained twenty-one. It might have happened if all but Mary Bazire had died almost immediately after the testator, and she had attained twenty-one, which she certainly did, and then the daughter had had another child born. That would have been a contingency that would have created the difficulty suggested; but the answer to that is, and it is a very common answer in all these cases, that one must not suppose a testator to have made a will that would be perfect for a conveyancer's precedent. Testators make their wills with reference to what they know is the state of their own families. For ordinary contingencies the will in

\* 382 \* question is perfectly sufficient: the testator's meaning I take to be this: that so long as his daughter had any child under the age of twenty-one years, whether those children were already *in esse*, or should come *in esse* during his life, or should come *in esse* after his death, was quite immaterial; that, so long as there were any of them in a state of minority, he created this trust adapted for the maintenance of these children: as each child got out of his minority he was to take an aliquot share, with a like share during his minority appropriated to his maintenance. That is the scope of the first trust: it is in truth, when put into plain language, a trust that during the minority of any child born or to be born of his daughter he gave the rents to the trustees upon certain trusts; what those trusts are it is immaterial to speculate upon. That is a perfectly good trust: about that there is no question: it has long ago expired, but it is necessary to consider the nature of it with a view to the ulterior limitations.

The next trusts commence when all the children have attained twenty-one; that is to say, they commence at a period clearly within the allowed limits, because they commence at a period that cannot by possibility be more remote than the life of the daughter and twenty-one years after. For whose benefit are those trusts, referred to by the Master of the Rolls as the second series of trusts? [His Lordship here read that portion of the will which had reference to the trusts after the youngest child of Mary Gooch

attained twenty-one, and then proceeded.] First of all, whom does the testator mean by grandchildren? He had six grandchildren, and a doubt that passed through my mind at one time was, whether that was a trust for all the six ; but I have come clearly to the conclusion that it was a trust for the four only who were surviving at the time of the \*youngest attaining \* 388 twenty-one, and for the following reason. During the minority, if any died leaving issue, those issue were to be substituted for them ; if they died not leaving issue (the two who died, died during the minority not leaving issue) they were to cease to have any further interest during the minority : and I think I may reasonably infer from that that the testator could not have meant, that when the minority ended there should be revived for them or their representatives an interest which had ceased during the minority. I therefore come to the conclusion that by "my said grandchildren" he means the grandchildren living when the minority trust ceased ; namely, the four.

The first trust, then, when the minority trust ceased, that is, the first trust at the period not beyond the prescribed limits, was a trust for four persons as tenants in common for their lives. That is not too remote, because it does not tend to perpetuity to give a life-interest at the end of a life in being and twenty-one years after. If a person gives only a life-interest, then his estate is alienable just as if he had given an estate in fee-simple for the person who has a life-interest, together with the person who is heir-at-law, or otherwise has the remainder, can convey the fee ; that is, all that is meant to be secured. At the determination therefore of the minority trusts, the persons to take were four persons then *in esse*, to take as tenants for their respective lives. That is clearly, in my opinion, a good trust, and so thought the Master of the Rolls. But then, what is to become of the share of each after his death ? I think it would have been a perfectly good trust if it had been a trust for the four with benefit of survivorship among them ; because, applying the same test as before, the four, together with the party who had the fee, the heir-at-law it would be in this case if the limitation over is \* bad, could then convey the fee. Whether \* 384 it were one life or a dozen lives surviving, still, according to the old expression, the candles are all burning out at once, and therefore the whole together could convey the fee. If therefore the trust had been for the benefit of the grandchildren and the

survivors, it would have been perfectly good ; but that is not the trust here ; it is according to the true construction for the benefit of each for his life, and at the expiration of the life-estate to the survivors if there is no issue of the party dying, but if there is issue then to the issue of that party. Now that, in spite of certain dicta in Fearn and other books that to give an estate to a party for life if he shall survive is often nothing more than a remainder, is in truth a contingent limitation ; because, interpreted, it is this, "I give one-fourth to my grandson James for his life, and after his death one-third of his one-fourth to my grandson John Tippell if he is living, if he is not living to his children ; another third to my grandson George if he is living, but if he is not living to his children ; another third to my granddaughter Maria if she is living, if she is not living to her children." Now it is plain that, applying the test of whether at the prescribed period there are persons capable of conveying the fee, it fails, and that here the survivors could not by concurring convey the fee. The life-interests are all fixed and determined, but nobody can say what the remainder over upon the death of each is. It is true that if you could read the limitation as to survivors only, it would be good. In my opinion, the limitation over cannot be sustained : it will not do to say that in one contingency the party is *in esse*, though in another he is not *in esse*, and that in the case where he is *in esse* it is good : the limitation must be such as to enable the absolute fee to be disposed of within the prescribed limits.

\* 885 \* Concurring then as I do with the Master of the Rolls in his interpretation as to the class of children that were contemplated, and as to the minority trusts, and considering the declaration as to the second class of trusts to be correct, I do not concur in the consequential direction giving to the plaintiff and to the defendants, George Gooch and Maria Cana, life-interests with benefit of survivorship between them ; that is, the trust substituting the issue having been held to be bad, his Honor has declared that the survivors take as if there were no such limitation to the issue. I think that is not correct, and it is this passage to which I alluded as one for which I do not find any warrant in the judgment as reported. I quite agree in saying that the limitation to the issue of the grandchildren is void ; but the consequence I arrive at is, that each of the four grandchildren took for their lives only, and that all the limitations over after that, during the subsistence of that

second trust, were void, and consequently lapsed to the heir-at-law as to the freeholds, and to the customary heir as to the copyholds.<sup>1</sup>

The only remaining point is one the decision of which, from what I have said, follows as a matter of course: namely, the ulterior trusts for the conveyance of the Sutton estate, and the distribution of the proceeds of the residuary estate. Inasmuch as, in my opinion, that was not to take place until after the termination of the second trust, that is, not until after the termination of lives not in being, or not necessarily in being, during the life of the testator, I concur with the Master of the Rolls, in that which I suppose was the main question here, in thinking that it was too remote. That decision depends upon the first point I adverted to; namely, that the daughter's children contemplated by the testator were not only children to be born in his lifetime, but also children to be born subsequently. The consequence is, \* that \* 386 I concur with the Master of the Rolls in every thing except the disposition of the rents and profits during the lives of the grandchildren.

I may as well add that there is no foundation for the notion that a decree to execute the trusts of a will makes the trusts valid which are bad on the face of the will. Such a decree only establishes the will against the heir, and orders the will to be carried into effect in such manner as the Court shall direct. (a)

<sup>1</sup> See *Edwards v. Tuck*, *ante*, 40, and citations in note (2).

(a) The following is an extract from the decree drawn up in pursuance of the judgment of the Lord Chancellor:—

“All parties by their counsel agreeing that the decree and orders in the original causes of *Bazire v. Tippell* and *Gooch v. Tippell* shall be considered as included in the petition of appeal, and that the petition of appeal shall be treated as a petition of rehearing of the order dated the first day of December, 1851, his Lordship doth order, that the said order made on the hearing of these causes for further directions be varied, and be as follows: His Lordship doth declare that, according to the true construction of the will of William Tippell, the testator in the pleadings of these causes named, the trusts therein expressed to be contained, ‘for the issue of his grandchildren (in the will referred to) who should happen to die leaving issue until the decease of the longest liver of his said grandchildren,’ are void as being too remote; and that the trusts, by the said will expressed to be declared of his messuage, farm lands, tithes, hereditaments, and real estate in Sutton, in the county of Suffolk or towns adjoining, in favour of ‘such son of any one of his grandchildren (in the said will referred to) as should at the decease of the survivor or longest liver of them be then the eldest living grandson of his daughter Mary Gooch and his heirs for ever’ are

also void as being too remote; and that the trusts by the said will expressed to be declared of the produce of the sale thereby directed to be made 'after the decease of the longest liver or survivor of his grandchildren (in the said will referred to), of the residue of his the said testator's real estate in favour of all and every his grandchildren (meaning great-grandchildren) the children (meaning grandchildren) of his daughter, whether male or female, other than and except such eldest grandson of his said daughter who should be entitled to his

said Sutton estate by virtue of the devise thereinbefore mentioned, as  
 \* 387 should be living at the decease \* of the survivor of his (the said testator's) grandchildren' are also void as being too remote. And his Lordship doth declare that, subject to the life-interests of each of them, the plaintiff and the defendants George Gooch and Maria the wife of Robert Cana, in one equal fourth part of the said Sutton estate, and all other the lands, tenements, tithes, and real estate whatsoever, as well copyhold and freehold as leasehold, devised by the said testator's will upon the trusts therein mentioned, the said plaintiff is now entitled to him and his heirs in his own right as customary heir of the said testator according to the custom of all the manors in the pleadings mentioned except Hollesley with Sutton, to all such parts of the said Sutton estate and the said residuary real estate as are copyhold held of the manors in the pleadings mentioned other than the said manor of Hollesley with Sutton; and that, subject to such life-interests as aforesaid, the plaintiff is also entitled as legal personal representative of the said testator's daughter Mary Gooch to the leasehold tithes of the said Sutton estate, and such other parts (if any) of the said testator's Sutton estate as are of leasehold tenure; and that, subject to such life-interests as aforesaid, the defendant Watson Gooch, as the customary heir of the said testator according to the custom of the manor of Hollesley with Sutton, is entitled to all such parts of the said Sutton estate and of the said residuary real estate as are copyhold held of the said manor of Hollesley with Sutton; and that, subject to such life-interests as aforesaid, the defendant Watson Gooch as the heir-at-law of the said testator is entitled to all such parts of the said Sutton estate and of the said residuary real estate as are of freehold tenure. And his Lordship doth declare that, upon the true construction of the said will and notwithstanding the decrees and orders in the said pleadings mentioned, John Tippell Gooch in the pleadings mentioned now deceased, the plaintiff, and the defendants George Gooch and Maria Cana, as the grandchildren living at the time when the youngest grandchild for the time being attained the age of twenty-one years, became then entitled to equitable estates for their lives as tenants in common in the said Sutton estate, and all other the said tenements, tithes, and the residuary real estate; and that after the death of each of them there is an intestacy as to the share to which he or she was entitled for life. And the plaintiff by his counsel waiving his right to any account of the rents of the said Sutton

estate or of the said residuary real estate received by the defendant  
 \* 388 Watson Gooch for the time past since the death of his (the \* said Watson Gooch's) father, the said John Tippell Gooch, it is ordered that each of them, the said plaintiff, the said defendant Jacoba Gooch as claiming under the said George Gooch, and the said defendant Mary Utting as claiming under the said Maria Cana, be let into the possession and into the receipt of the rents and

profits as from the 25th day of December, 1851, of one undivided fourth part of the said Sutton estate and all other the said tenements, tithes, and residuary real estate, the share of the said defendant Jacoba Gooch being received by her as assignee of the life-interest of the said defendant George Gooch, subject to the payment of the annuity of 100*l.* in the pleadings mentioned, and the share of the said defendant Mary Utting being received by her as assignee of the life-interest of the said Maria Cana upon the trusts of the settlement made upon the marriage of the defendants Robert Cana and Maria his wife. And it is ordered that the said plaintiff be let into possession as from the said last-mentioned day of such parts of the remaining fourth part of the said Sutton estate and residuary real estate as are of copyhold tenure other than such parts thereof as are held of the manor of Hollesley with Sutton. And it is ordered that the said Watson Gooch be let into possession as from the said last-mentioned day of such part of the remaining one-fourth part of the said Sutton estate and residuary real estate as are of freehold tenure and as are copyhold of the manor of Hollesley with Sutton. And it is ordered that the said plaintiff be let into the possession as from the said last-mentioned day of the said remaining one-fourth part of the said leasehold tithes or other parts (if any) of the said Sutton estate and residuary real estates as are of leasehold tenure. And it is ordered that the tenants of the said Sutton estate and of the said residuary real estates do attorn tenants to the said plaintiff, and the said defendants Jacoba Gooch and Mary Utting and Watson Gooch according to such respective rights and interests as aforesaid. And it is ordered that the said defendants Louisa Clarke and Maria Tippell, as the admitted tenants of such parts of the said Sutton estate as are copyhold holden of the three several manors of Sutton Hall, Stockerland, and Campsey, do surrender the same to the use of the plaintiff and his heirs and assigns, or as he or they shall direct subject to the life-interest of each of them the said plaintiff and the defendants George Gooch and Maria Cana in one-fourth part of the same premises, and in such surrender or surrenders all proper parties are to join as the Master to whom these \* causes are referred shall direct in case the parties differ about the same. And it is ordered that the said defendants Louisa Clarke and Maria Tippell, or the parties entitled to be admitted to such parts of the said Sutton estate and the said residuary real estate as are copyhold held of the manor of Ufford, with the members Blaxhall Hall, Overhall in Otley, Netherhall in Otley, and Walthamstow Toney and High Hall, do cause themselves to be admitted tenants thereto in such manner as the said Master shall direct in case the parties differ about the same upon payment or provision for the fines and fees due upon such admissions being made with the approbation of the said Master under the directions hereinafter contained. And it is ordered that the said Louisa Clarke and Maria Tippell, upon being so admitted as last aforesaid, do surrender all such last-mentioned copyhold hereditaments to the said plaintiff and his heirs and assigns or as he or they shall direct, subject to the said life-interests of each of them, the plaintiff and the said defendants George Gooch and Maria Cana in one fourth part of the said premises, and in such surrender or surrenders all proper parties are to join as the said Master shall direct in case the parties differ about the same. And it is ordered that the defendant Thomas Tippell, as the legal personal representative of the last sur-

1853. March 5. June 8. Before the Lord Chancellor Lord CRANWORTH.

A testator directed his executors to pay "the sum of 500*l.* apiece to each child that may be born to either of the children of either of my brothers lawfully begotten:" *Held*, that the child of a niece born within eight months after the testator's death was entitled to the legacy, and that the gift was not as to such child void for remoteness.<sup>1</sup>

Distinction, on a question of remoteness, between the gift of a sum in gross to be distributed among a class, and the gift of distinct legacies to a number of persons.<sup>2</sup>

WILLIAM TOWNSEND by his will, dated the 31st March, 1827, after certain specific legacies, gave the residue of his personal estate to Matthew Shaw, John Benbow, John Townsend, and Job Townsend, whom he appointed his executors, upon trust (after payment of all his just debts, funeral and testamentary expenses, and the several legacies thereinbefore by him bequeathed, together with the whole of the legacy duty and duties payable in respect of the several legacies and annuities by him therein given) to make certain investments for the benefit of various legatees: the testator directed the ultimate residue of his estate to be paid and divided amongst all and every his next of kin who should be living at the time of his decease, share and share alike, to and for their, his, and her own respective use and benefit.

By a codicil to his will, dated the 14th November, 1827, the testator disposed of his freehold, copyhold, and leasehold estates;

<sup>1</sup> See 2 Jarman Wills (3d Eng. ed.), 166 *et seq.*; *Butler v. Lowe*, 10 Sim. 317; *Mann v. Thompson*, Kay, 638; *Deffis v. Goldschmidt*, 19 Ves. 566.

<sup>2</sup> See 1 Jarman Wills (3d Eng. ed.), 239 *et seq.*; *Greenwood v. Roberts*, 15 Beav. 92; *Seaman v. Wood*, 22 Beav. 591; *Cattlin v. Brown*, 11 Hare, 372; *Webster v. Boddington*, 26 Beav. 128; *Wilson v. Wilson*, 4 Jur. N. S. 1076; *James v. Lord Wyndford*, 1 Sm. & Gif. 58, 59.

living trustee of the said leasehold tithes and such other parts (if any) of the said Sutton estate as are of leasehold tenure, do assign the same to the said plaintiff as the legal personal representative of the said Mary Gooch or as the said plaintiff shall direct, subject to the said life-interest of each of them the said plaintiff and the said defendants George Gooch and Maria Cana in one-fourth part of the same premises, such assignment to be settled by the said Master in case the parties differ about the same."

and by a second codicil, dated the 10th March, 1832, after bequeathing legacies of 500*l.* each to four persons by name who were children of Alice Early, a daughter of Henry, one of the testator's brothers, he gave and bequeathed in the words and figures following; namely,—“*Item.* I direct my executors to pay by and out of my personal estate exclusively the sum of 500*l.* apiece to each child that may be born to either of the children of either of my brothers lawfully begotten, to be paid to each of them on his or her attaining the age of twenty-one years without benefit of survivorship.”

\* The testator died on the day of the date of the second \* 391 codicil; and it appearing doubtful who might be entitled to claim legacies under the general bequest in the codicil, a suit was instituted in the name of William Townsend Storrs, an infant child of a daughter of one of the testator's brothers and who was born after his death, the bill in which prayed that the executors might be decreed to set apart from the general personal estate of the testator the sum of 500*l.*, and to invest the same on proper security at interest for the benefit of the plaintiff until he should become entitled to receive the same, and that the same might then be paid to him.

The cause came on to be heard before the Master of the Rolls (Sir JOHN LEACH), who made a decree therein, dated the 8th July, 1833, declaring that the children *in esse* only at the time of the death of the testator were entitled to the legacies of 500*l.* each, and referring it to the Master to inquire and state whether the plaintiff was *in esse* at the time of the death of the testator. (a)

The Master by his report, dated the 20th November, 1833, found that the plaintiff was born on the 29th October, 1832, and that the testator died on the 10th March, 1832, and it therefore appeared to him and he found that the plaintiff was *in esse* at the time of the death of the testator. This report was absolutely confirmed by an order, dated the 23d January, 1834; and the administration of the testator's estate was proceeded with upon the footing of the decree, the executors considering that they would be justified in paying the 500*l.* to the plaintiff when he came of age.

Two other questions subsequently arose upon the \* clause \* 392

(a) See *Storrs v. Benbow*, 2 M. & K. 46.



above mentioned, and were brought at different times before the Court for decision. The first of these was, whether the four children of Alice Early, to whom legacies of 500*l.* were bequeathed by name in the codicil, were also entitled to take similar legacies under the clause; and as to this the Vice-Chancellor KNIGHT BRUCE decided that the parties just named were not entitled to double legacies. (a) The other question was, whether a fifth child of Alice Early, born after the date of the will but before the date of the second codicil, was entitled to a legacy of 500*l.* under the clause; and on this the Master of the Rolls (Sir JOHN ROMILLY) decided that the child was not so entitled. (b)

In the course of the discussions which thus took place, doubts were suggested whether the clause in question was not altogether void for remoteness; and as the plaintiff, together with two other children similarly circumstanced with him, were about shortly to come of age, and would then be entitled under the decree of Sir JOHN LEACH to the payment of legacies of 500*l.* each, the representatives of the residuary legatees were advised to bring the question of construction again before the Court, by way of appeal from that decree. They accordingly appealed to the Lord Chancellor by petition (c) under the 6th Order of the 7th August, 1852, as to the enrolment of decrees, &c.; and on the 21st January, 1853, an order was made by the full Court of Appeal that the time for appealing from the decree of the 8th July, 1833, should be enlarged until the first day of Easter term then next.

\* 393 . \* The representatives of the residuary legatees then presented their petition of appeal, praying that the decree of the 8th July, 1833, might be reversed or altered, and that it might be declared that the bequest of the legacies of 500*l.* each, contained in the second codicil, was void for remoteness, or that in the event which happened of the testator's death on the day of the date of the said codicil no legacy became payable under the bequest. This petition of appeal now came on to be heard before the Lord Chancellor.

*Mr. Willcock* and *Mr. Rogers* supported the decree of Sir J.

(a) See *Early v. Benbow*, 2 Coll. 342.

(b) See *Early v. Middleton*, 14 Beav. 453.

(c) The application was first made by motion, but the parties were then directed to present a short petition stating the special circumstances of the case.

LEACH. — They submitted that the plaintiff exactly answered the terms of description contained in the codicil, and that the Court would not be inclined to put such a construction on the words as to make the gift void for remoteness. They cited and commented on, *Sprackling v. Ranier*, (a) *Ringrose v. Bramham*, (b) *Burdet v. Hopegood*, (c) *Millar v. Turner*, (d) *Wallis v. Hodson*, (e) *Nanfan v. Legh*, (g) *Lancashire v. Lancashire*, (h) *Clarke v. Clarke*, (i) *Whitelock v. Heddon*, (k) *Trower v. Butts*, (l) *Storrs v. Benbow*, (m) *Boughton v. James*, (n) *Early v. Benbow*, (o) *Early v. Middleton*. (p)

*Mr. Teed* and *Mr. Shebbeare*, for the appellants. — They contended that the entire gift in the codicil was void for remoteness: there was nothing to show that \* the testator meant \* 394 to confine it to the children of his then born nephews, and thus there was no limitation of the class of legatees. The necessity of applying the rule as to remoteness was shown by the fact that it would be impossible for the executors to deal with the case of one individual singly and pay his legacy, because they would not know whether they had sufficient funds. The word "may" used in the clause clearly indicated futurity, and had been so treated by all the Judges before whom the case had come. If the plaintiff was to be considered as born at the date of the codicil, it was impossible to say that he fell within the description. They cited, and commented on, *Porter v. Fox*, (q) *Doe v. Hallett*, (r) *Boughton v. James*. (n)

[The Lord Chancellor drew attention to the cases of *Leake v. Robinson*, (s) and *Lord Dungannon v. Smith*. (t)]

*Mr. Willcock* replied.

(a) 1 Dick. 344.

(b) 2 Cox, 384.

(c) 1 P. W. 486.

(d) 1 Ves. 85.

(e) 2 Atk. 115.

(g) 7 Taunt. 85.

(h) 5 T. R. 49.

(i) 2 H. Black. 399.

(k) 1 Bos. & Pul. 243.

[(l) 1 S. & S. 181.

(m) 2 M. & K. 46.

(n) 1 Coll. 26.

(o) 2 Coll. 342.

(p) 14 Beav. 453.

(q) 6 Sim. 485.

(r) 1 M. & S. 124.

(s) 2 Mer. 363

(t) 12 Cl. & Fin. 546.

The Lord Chancellor, at the conclusion of the argument, intimated an opinion that, *quodcumque vid*, whether as a child *in esse* at the death of the testator, or as not born until after the date of the codicil, the plaintiff would be entitled, but at the same time expressed some doubt as to the correctness of the holding of Sir J. LEACH confining the gift to children born in the testator's lifetime. His Lordship referred also to the appellant's argument on the question of remoteness, and observed that he was not aware that the rule applicable to the case of a gift of a gross fund distributable between persons forming a class, some of whom might be within and some beyond the limits allowed by law, had \* 395 been \* extended to the gift of distinct legacies to a number of persons. His Lordship said that he would look into the authorities and dispose of the matter at a future day.

June 8.

THE LORD CHANCELLOR. — I was perfectly prepared to dispose of this case three months ago, but was told that the point was very much the same as that raised in *Gooch v. Gooch*, (a) and that the parties therefore wished the matter to stand over until that case was disposed of, thinking it might have a material bearing upon the present question. I confess, however, that this appears to me to be a perfectly clear case, and to be independent of any decision in *Gooch v. Gooch*.

The question arises upon a clause in a codicil which is in these words: "*Item*. I direct my executors to pay by and out of my personal estate exclusively the sum of 500*l.* apiece to each child that may be born to either of the children of either of my brothers lawfully begotten, to be paid to each of them on his or her attaining the age of twenty-one years without benefit of survivorship." This is a money legacy to each child of any nephew the testator had or might have. The testator had brothers living; but there might be legacies too remote, because the gift included legacies to children of a child not yet born.

The bill was filed twenty or thirty years ago; and the cause was heard before Sir JOHN LEACH. The argument then was, that the gift was too remote; but Sir JOHN LEACH thought that, according to the true construction of the clause, children born in the

(a) *Ante*, p. 366.

lifetime of the testator were meant, and therefore he said the gift could not be too remote, for it only let in children that \* might be born between the date of the will and the death. \* 396 A decree was accordingly made declaring that the children *in esse* only at the time of the death of the testator were entitled to the legacies, and it was referred to the Master to inquire, &c. The Master found that the plaintiff was *in esse* in this sense; namely, that the testator died in October and the plaintiff was born six months afterwards; and I think he was so. The question then is whether he is entitled; I am of opinion that he certainly is; for he was a child *in esse* within the meaning put upon the clause by Sir JOHN LEACH.

There are three ways in which this gift might be interpreted: it might mean children that were *in esse* at the date of the will; it might mean children that might come into *esse* in the lifetime of the testator; and it might mean children born at any time. I own it seems to me that this gentleman is entitled *quâcunque viâ*. If it was to the children then in being, he would, I think, be probably within the meaning of such description; but if it was to children to come *in esse* in his lifetime and afterwards to be born, it seems to me that a child *in ventre sa mère* at the death of the testator was a child "hereafter to be born" within the meaning of the provision.

The rule that makes a limitation of this kind mean children at the death of the testator is one of convenience: a line must be drawn somewhere, otherwise the distribution of the testator's estate would be stopped, and executors would not know how to act; but that rule of convenience cannot be applied to exclude a child certainly within the meaning of the limitation, in the absence of any contrary expressed intention of the testator. I think therefore that Sir JOHN LEACH was right, supposing the interpretation of the will to be \* what I have stated, and that this child \* 397 certainly comes within the description. I must add, however, that I do not say that the gift was at all remote if it meant a child to be born at any time, because this is not the case of a class; it is a gift of a pecuniary legacy of a particular amount to every child of every nephew which the testator then had, or of every nephew that might be born after his death, and is therefore good as to the children of the nephews he then had, and bad as to the children of nephews to be born after his death.

It would be a mistake to compare this with *Leake v. Robinson* (a) and other cases where the parties take as a class ; for the difficulty which there arises as to giving it to some and not giving it to others does not apply here. The question of whether or not the children of after-born nephews shall or shall not take, has no bearing at all upon the question of whether the child of an existing nephew takes ; the legacy given to him cannot be bad because there is a legacy given under a similar description to a person who would not be able to take because the gift would be too remote. I give therefore no positive opinion upon the point of remoteness generally in this case, because I think that *quidcunque vid*, on the construction of the will, there is nothing to justify the exclusion from taking of a child who was conceived at the death of the testator and born six or seven months afterwards. If the words in question meant children who though not then in existence should be in existence at the death, the plaintiff was in existence at the death ; and if they meant children born at any time, he was born and must have been born if at all within such a time as made his legacy not remote. I am therefore of opinion that in any way he is entitled.

\* 398

\* PEARSON v. RUTTER.<sup>1</sup>

1853. May 27, 28. June 11. Before the Lord Chancellor Lord CRANWORTH.

Estates H. & S. were devised to trustees upon trust for R. W. and the heirs of his body, but in case he should die under the age of twenty-one and without issue as to estate H. for A. W. and the heirs of her body, but in case she should die under the age of twenty-one and without issue upon such and the same trusts as were thereafter declared concerning estate S. ; and if R. W. should die under the age of twenty-one and without issue as to estate S. for the testator's son and daughter-in-law for their lives, "and subject to the trusts hereinbefore thereof declared," estate S. was ultimately devised to other persons. R. W. and A. W. both attained twenty-one, but died without issue: *Held*, approving of the decision in *Doe v. Jessep*, 12 East, 288, as opposed to that in *Brownword v. Edwards*, 2 Ves. 242, that the double contingency not

(a) 2 Mer. 363.

<sup>1</sup> S. C. *nom.* *Grey v. Pearson*, 6 H. L. Cas. 106.

having happened, there was an intestacy as to estate H., but that the ultimate devise as to estate S. took effect.<sup>1</sup>

THIS was an appeal by the plaintiffs from a decree of the Vice-Chancellor TURNER pronounced on the 6th December, 1852, and whereby the bill was dismissed.

Richard Watson, the testator in the cause, by his will bearing date the 25th August, 1817, devised his farm and messuages at Stainton and Hemlington to Robert Watson Darnell and Watson Chapman, their heirs and assigns for ever, upon trust to raise annuities and a sum of 2000*l.* for the benefit of his granddaughter, "and subject to the trusts aforesaid all the premises hereinbefore devised shall be in trust for my grandson Robert Watson and the heirs of his body; but in case he shall die under the age of twenty-one years and without issue, my said messuage or dwelling-house and farm at Hemlington aforesaid, and my said six messuages or cottages at Stainton aforesaid (subject to the trusts hereinbefore thereof respectively declared), shall be in trust for my granddaughter Ann Watson and the heirs of her body; but in case she shall die under the age of twenty-one years and without issue, the said last-mentioned premises shall be upon such and the same trusts as are hereinafter declared concerning my said messuage or dwelling-house and farm at Stainton aforesaid; and I declare

<sup>1</sup> See *Malcolm v. Malcolm*, 21 Beav. 225; *Coates v. Hart*, 32 Beav. 349; *Secombe v. Edwards*, 6 Jur. N. S. 642; 1 *Jarman Wills* (4th Am. ed.), [443] 426 and cases in note (1), (3d Eng. ed.) 474 *et seq.*; *Grey v. Pearson*, 6 H. L. Cas. 106. In *Mortimer v. Hartley*, 6 Exch. 47, the authority of *Brownsword v. Edwards* was recognized and followed. It appears from numerous American cases that where it clearly appears from the will that the testator intended to use the word "or" in a conjunctive sense, or the word "and" in a disjunctive sense, the Court will so construe the will as to give to those words respectively the meaning intended. See *Hunt v. Hunt*, 11 Met. 88; *Parker v. Parker*, 5 Met. 134; *Carpenter v. Heard*, 14 Pick. 449; *Arnold v. Buffum*, 2 Mass. 208; *Ray v. Enalin*, 2 Mass. 554; *Sayward v. Sayward*, 7 Greenl. 210; *Butterfield v. Hawkins*, 33 Maine, 393; *Turner v. Whitted*, 2 Hawkes, 613; *Jackson v. Blanshan*, 6 John. 54; *Beall v. Deale*, 7 Gill & J. 216; *Janney v. Sprigg*, 7 Gill, 197; *Kelso v. Dickey*, 7 W. & Serg. 279; *Den v. Taylor*, 2 South. 413, 430; *Den v. English*, 2 Harrison, 280; *Den v. Mugway*, 3 Green, 330; *Ward v. Waller*, 2 Speers, 786; *Beltzhoover v. Costen*, 7 Barr, 13, 18; *Haver v. Shitz*, 2 Binn. 545; *Holmes v. Holmes*, 5 Binn. 259; *Halcomb v. Lake*, 4 Zab. (N. J.) 686; *Van Vechten v. Pearson*, 5 Paige, 512; *Harrison v. Bowe*, 3 Jones Eq. 478; *Robertson v. Johnston*, 24 Geo. 102; *Armstrong v. Moran*, 1 Bradf. Sur. 314; *Mason v. Mason*, 2 Sandf. Ch. 432.

and direct that if my said grandson Robert Watson shall die  
 \* 399 under \* the age of twenty-one years and without issue, then, and in that case, the said Robert Watson Darnell and Watson Chapman, their heirs and assigns, shall stand and be seised of my said messuage or dwelling-house at Stainton aforesaid and the said farm at Stainton aforesaid now in the occupation of the said John Sherwood, upon the trusts following (that is to say); in trust to pay the rents, issues, and profits of the same premises to or for the use of my said son Richard Watson, for and during his natural life, at the same times and in like manner and subject to the same restrictions, control, and determination as are hereinafter mentioned or declared of or concerning the said annuity or yearly sum of 60*l.* hereby provided for him as aforesaid, and from and after his decease or other sooner determination of his life-interest therein in trust to pay the same rents, issues, and profits unto my said daughter-in-law Mary Watson during her life if she shall so long continue the widow of the said Richard Watson; and subject to the trusts hereinbefore thereof declared the said messuage and farm at Stainton aforesaid shall be in trust for my grandson William Darnell and the said Robert Watson Darnell, and my granddaughter Elizabeth Darnell, in equal shares as tenants in common, their respective heirs and assigns for ever."

The testator died in 1817. The following account of the state of his family at the time of his death, and at the date of the institution of this suit, will be useful. He had been twice married; by his first marriage he had three children, all of whom predeceased him, but one of these, Margaret, died in 1789, leaving two children, Elizabeth and Robert Darnell; the latter died in 1829, leaving issue Robert Mowbray Darnell, one of the defendants. By his second wife, who died in 1817, the testator had one son Richard Watson, who died in 1844, leaving one son Robert  
 \* 400 and one daughter Anne, the \* former of whom died in 1848 without issue and without having barred the estate tail, but having attained the age of twenty-one years, and having devised all his estates to his sister Anne. She died in 1849 without issue, but having attained twenty-one, and having by her will devised in like manner to the plaintiffs William Pearson and William Hill. The case made by the bill was that the limitations in the testator's will in favor of his grandson Robert had, in the events which had happened, become inoperative, and that the reversion in fee, ex-

pectant on the determination of the particular estate in Robert, had consequently vested in Richard Watson, and from him descended upon Robert. The Vice-Chancellor dismissed the bill, being of opinion that the last clause of the will beginning, "subject to the trusts hereinbefore thereof declared," overrode all the previous limitations, and that inasmuch as Robert Watson had not barred the estate tail, all the estates must go in accordance with the ultimate devise.

From that decree the plaintiffs now appealed to the Lord Chancellor.

*Mr. Rolt* and *Mr. Faber*, for the appellants. — The first point to be arrived at in the construction of this will is to ascertain what was the general intention of the testator. It is clear that he intended to give an estate tail to his grandson Robert; the subsequent gift over is only to take effect in the event of his death under twenty-one and without issue. *Doe d. Usher v. Jessep.* (a) In the case of *Davis v. Norton* (b) the double contingency was held to override all the limitations, though the second devise had reference only to one of such contingencies; \* and in *Doe d. Watson v. Shipphard* (c) a single contingency was held to extend to all limitations in the will. The case of *Lethieullier v. Tracy* (d) may probably be relied upon by the other side, but that is only an authority to show that where there is a devise for a special purpose it does not follow that every subsequent limitation shall be necessarily dependent on that purpose; besides in that case the word *item* which prefaced the subsequent limitation was held to be indicative of a fresh departure, irrespective of the previous contingency. They also referred to *Holmes v. Cradock* (e) and to the observations of Lord ELDON in *Moody v. Walters.* (g)

*Mr. Walker* and *Mr. Robson*, for the defendant, R. M. Darnell, in support of the Vice-Chancellor's decree. — We submit that the contingencies only applied to the limitations to which they were immediately annexed, and not to the estate devised to the Darnells, which was a perfectly independent devise. *Napper v. San-*

(a) 12 East, 288.

(b) 2 P. W. 390; S. C., Fearnle Cont. Rem. 236.

(c) Dougl. 75.

(e) 3 Ves. 317.

(d) 3 Atk. 774.

(g) 16 Ves. 283; see p. 297.



ders, (a) *Lethieullier v. Tracy*, (b) *Bradford v. Foley*, (c) *Horton v. Whittaker*. (d) According to the plaintiffs' construction, if the son had died immediately after attaining twenty-one without issue, there would have been a clear intestacy, the result of which would have been that the estate would have gone to the very person to whom the testator had limited an estate for life only.

The condition is clearly disjunctive, and not copulative, and the word "and" must be read "or." *Brownsword v. Edwards*. (e)

\* 402 *The Solicitor-General and Mr. E. F. Smith*, for the defendants, John Grey, Thos. T. Trevor, and Catherine Darnell, the devisees of William Darnell, also in support of the Vice-Chancellor's decree. — This is one of those cases where the remainder is limited in words which seem to import a contingency, though in fact they mean no more than would have been implied without such words. *Boraston's Case*, (g) *Fearne Cont. Rem.* 241, 242.

The words "and without issue" are mere surplusage, and may be dispensed with even upon the plaintiffs' construction. Admitting, however, for the sake of argument, that the words do denote a double contingency, and that all the subsequent limitations are executory, yet there is no rule more firmly established than that whatever can take effect as a remainder is not to be construed as an executory limitation. The words "subject to the trusts hereinbefore thereof declared" are strictly technical, and embrace all the anterior limitations.

The Lord Chancellor referred to *Phipps v. Ackers*. (h)

*Mr. Chandless*, for the defendant Elizabeth Darnell, cited *Luzford v. Cheeke*, (i) *Fearne Cont. Rem.* 239, Butler's note to *Fearne*, p. 7; *Doo v. Brabant*, (k) *Pearsall v. Simpson*. (l)

*Mr. Hale*, for the trustees.

*Mr. Rolt*, in reply. — The authority of *Brownsword v.*

\* 403 *Edwards*, (e) so far as\* it is inconsistent with the later

(a) *Hutton*, 118.

(e) 2 *Ves.* 243.

(i) 3 *Lev.* 125.

(b) 3 *Atk.* 774.

(g) 3 *Rep.* 19, a.

(k) 3 *B. C. C.* 393.

(c) *Doug.* 63.

(h) 9 *Cl. & Fin.* 583.

(l) 15 *Ves.* 29.

(d) 1 *T. R.* 346.

decision of the Court of King's Bench in *Doe v. Jessep*, (a) must be treated as overruled. It may be observed that, in the case of *Brownsword v. Edwards*, (b) the will was construed by the event in favour of a daughter, who, without such a construction as there put on the word "and," would have been left without any provision.

May 28.

THE LORD CHANCELLOR. — I have a very strong opinion in this case: as at present advised, the decree appears to me to be partly right and partly wrong; but in deference to the very learned Judge whose decision is now under review, I shall take a little more time to consider before I finally dispose of this appeal. I will however shortly state my present views on the subject.

The first question which arises is as to the meaning of the limitation over, after the gift to the grandson Robert in tail. The language is this, "subject to the trusts aforesaid;" that is, the trusts for providing for legacies and other things, — "All the said premises hereinbefore devised shall be in trust for my grandson Robert Watson and the heirs of his body:" that gives him an estate tail; "but in case he shall die under the age of twenty-one years, and without issue," then certain provisions are made. The contention on the part of the respondents has been, that it means only in case he dies without issue; if that be so, it solves all difficulties, and then the limitations will embrace both the Hemlington and Stainton estates. But is that so? If the ulterior devise had been expressly dependent on the single contingency of the grandson's dying without issue, the contention of the respondents would have of course prevailed; \* but the words are, "in \* 404 case he shall die under the age of twenty-one years and without issue." It was argued on the authority of Lord HARDWICKE, in the case of *Brownsword v. Edwards*, (b) that whether the word "and" be changed into and read as "or" or not, the words "under the age of twenty-one years" are to be regarded as having no operation. It is true, on the one hand there is the very high authority of Lord HARDWICKE for such a construction, and on the other hand there is the case of *Doe v. Jessep*, (a) in which the Court of King's Bench, consisting at that time of Lord ELLENBOROUGH, Mr. Justice LE BLANC, and Mr. Justice BAYLEY, having a

(a) 12 East, 288.

(b) 2 Ves. 243.

similar question before them, and having the case of *Brounsword v. Edwards* brought to their attention, expressed a contrary opinion. Lord ELLENBOROUGH, referring to that case, in substance said Lord HARDWICKE's authority is very high, but there is an appeal even from Lord HARDWICKE to common sense, and if the rule of construction giving effect as far as possible to all the words that are used by a testator is to be regarded, on what principle are particular words to be rejected? The Court of King's Bench accordingly refused to adopt the construction which involved the rejection of the very words now before me, and I am not aware that the decision in *Doe v. Jessep* (a) has ever been questioned. If it has not, I might be doing as much injury perhaps by acting on Lord HARDWICKE's authority as I should do by acting against it if there was no such decision as that of *Doe v. Jessep*. (a) In all cases of this nature, although a decision may have crept in *per incuriam*, the difficulty is in acting in opposition to it, because it is impossible to say what settlements or arrangements may have been made on the faith of such a decision. Lord HARDWICKE's decision

\* 405 was in the year \* 1750, and the decision of the Court of King's Bench was pronounced about sixty years afterwards, and now upwards of forty years have elapsed since that decision. If I am to choose between the two authorities, I think that the later decision is that which every person not a lawyer would say is the correct one, and that it is more in accordance with the sound rule in the construction of wills of giving effect to the plain sense of the words used. I cannot attribute weight to the argument that has been addressed to me by the counsel for the respondents, that though the words dying under twenty-one seemed to import a contingency, yet that in reality they only denoted the period at which the estate was to vest. The decision of the Vice-Chancellor did not turn upon that; he considered, as I do, that the limitation was in case the grandson should die under the age of twenty-one years and without issue; and therefore, although the grandson died without issue, yet, after having attained the age of twenty-one, the limitation over in such an event did not happen, but he thought that the effect of the subsequent clause, "subject to the trusts hereinbefore thereof declared," was broad enough to include all the anterior limitations.

(a) 12 East, 288.

That being so, the question is, How are these several estates to go? With regard to Stainton I have in the course of the argument had some little doubt; but my present strong impression is that the decision of the Vice-Chancellor is perfectly right upon that branch of the will. [His Lordship here read the words of the will and proceeded.] It remains then to be considered, with respect to the Hemlington estate, whether the clause in the will, limiting that estate on certain events to go as the Stainton estate, is governed by the ultimate limitation, so that the Hemlington estate shall be included in the ultimate devise applied to the Stainton estate. Although \*in the course of the argu- \* 406 ment I have entertained some doubts upon that portion of the will, yet upon the whole my strong impression is that the ultimate limitation does not necessarily govern that clause. It may be that the testator contemplated that the former trusts were contingent only on the grandson's dying without issue, and that this last clause would override all the former limitations; it may be (which is by far the most probable supposition) that he knew nothing at all about it. The will is very inartificially prepared by some professional adviser, and the construction which must be put on the words in all probability will not carry into effect the testator's real intention; but that of course is mere matter of speculation. Looking, however, to the language used, I do not see any thing necessarily to connect the ultimate limitation with the former. I read the clause, "I direct that if my grandson shall die under the age of twenty-one years and without issue, then and in that case the trustees shall stand possessed of the Stainton estate on the trusts following," to mean the trusts next following; that is to say, as to that estate he makes provision for his son and daughter-in-law, and (their issue being out of the question) he then stops and breaks off, by introducing the words "subject to the trusts hereinbefore thereof declared," which I think should be read independently of the former clause, upon the same principle that in the case of *Lethieullier v. Tracy* (a) the *item* clause was treated as a fresh departure, and a start upon a new disposition. The ultimate limitation amounts therefore to a declaration of trust as to the Stainton estate only, subject to every preceding trust that had affected that estate. This view is supported by the fact

(a) 3 Atk. 774.

that exactly the same words are used in the first declaration of trust as to the Hemlington estate after the death of Robert

\* 407 Watson under \*twenty-one and without issue, and which limitation is clearly applicable to the Hemlington estate only. In the same way I think that the ultimate limitation as to the Stainton estate must be read as a limitation applicable to the Stainton estate only, and intended to refer to the trusts immediately preceding, and which had not been before fully declared as to that estate. What, then, is the result with respect to the Hemlington estate, both Robert and Anne Watson having died without issue, but both having attained twenty-one? I am inclined to think, as I have already suggested, that the testator, in the events which have happened, intended both estates should go together; but that is mere conjecture, and there is no course which in my opinion the Court ought to pursue more strictly than that of repudiating the notion of construing wills only by considering what a testator might have intended by the language he has used. It leads to the loosest way of framing testamentary instruments, and may frequently be the means of defeating the intention in the teeth of words correctly used for expressing that intention. This Court cannot know the motives by which a testator has been actuated, and the only safe course is to see what is the reasonable construction of the words he has employed. With respect, then, to the Hemlington estate he has declared that in case his grandson and granddaughter should die under the age of twenty-one years and without issue (events which did not happen), then that estate should go and be upon the same trusts as were subsequently declared concerning the Stainton estate. He says nothing more as to the Hemlington estate; it is not carried over; unless I am to hold that the words importing the double contingency are to be read in the same way as in *Brownsword v. Edwards*, (a)

\* 408 a construction which I am not disposed to \*adopt. It may in all probability have been a mere lapse on the part of the testator; he may, on the other hand, have had the very events which have happened in his view when he framed his will, which is more improbable; I cannot, however, speculate about such matters. He has framed his will in language which admits of no doubt as to its construction, and that being so I think the Vice-

(a) 2 Ves. 243.

Chancellor was wrong in treating the Hemlington estate as coming under the same category of trusts as those affecting the Stainton estate.<sup>1</sup>

I shall finally dispose of this case in a few days; and, unless I should in the mean time see any reason to modify my present opinion, the decree of the Vice-Chancellor must be varied in conformity with the judgment I have now expressed.

June 11.

The Lord Chancellor observed that, on reconsidering the case, he remained of the same opinion as that which he had expressed at the conclusion of the argument.

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\* In the Matter of EDWARD DALE COLLINSON, a \* 409  
Person of Unsound Mind;

AND

In the Matter of THE TRUSTEE ACT, 1850.

COLLINSON v. COLLINSON.

1853. March 16. July 16. Before the Lord Chancellor Lord CRANWORTH.

Lands bought by a father in the name of his son held under the circumstances of the case not to amount to an advancement;<sup>2</sup> but the Lord Chancellor declined to make an order to that effect on the petition of the father without a suit, though the petition was founded on the certificate of the Master under the 38th section of the Trustee Act, 1850, and a suit was instituted accordingly.

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<sup>1</sup> See 1 Jarman Wills (3d Eng. ed.), 789, 790; *Boosey v. Gardner*, 5 De G., M. & G. 122; *Quicke v. Leach*, 13 M. & W. 218; *Sheffield v. Earl of Coventry*, 2 De G., M. & G. 551.

<sup>2</sup> The advancement of the son is a mere question of intention, and therefore facts antecedent to or contemporaneous with the purchase, or so immediately after it as to constitute part of the same transaction, may properly be put in evidence for the purpose of rebutting the presumption that a provision was intended. *Lewin Trusts* (5th Eng. ed.), 143, 144. See 1 Lead. Cas. in Eq. (3d Am. ed.) 257 [166] *et seq.*, notes to *Dyer v. Dyer*; 2 Story Eq. Jur. § 1202; *Sidmouth v. Sidmouth*, 2 Beav. 447; *Christy v. Courtenay*, 13 Beav. 96; *Jeans v. Cook*, 24 Beav. 513; *Williams v. Williams*, 32 Beav. 370; *Tucker v. Burrow*, 2 H. & M. 524; *Murless v. Franklin*, 1 Sw. 17, 19; *Grey v. Grey*, 2 Sw. 594; *Lloyd v.*

THE petition was presented by John Collinson, the father of the lunatic, and it prayed the appointment of a person to convey and surrender to a trustee for the petitioner certain copyhold and freehold lands, which had been purchased by him in the name of his son, the lunatic, in whom the legal estate was then vested.

The petition, which came on to be heard on the 16th March, 1858, stated that, in pursuance of the power conferred on the Master by the 38th section of the Trustee Act, 1850 (13 & 14 Vict. c. 60), he had certified that, by the customs of the manor of Soulby and of other adjoining manors in the county of Westmoreland, the lands of customary tenure in such manors were liable to heavy fines on the death of the lord, and on death or alienation by the tenant or owner; that, prior to the 1st January, 1838, the lands of customary tenure within the said manor could not be disposed of by will, and in order to enable an owner of such lands to obtain a disposing power by will over such lands, and to enable him to create any trust of such lands, it was necessary to convey such lands to a trustee, and such trustee to be admitted a tenant upon the Court rolls, and that, upon his admittance, a fine would become due to the lord, and in such case also it would be necessary for the trustee again to convey to the person entitled to the lands,

when another fine would also become due to the lord; and  
 \* 410 that, \* in all cases of conveyance of lands to a trustee, the trusts must be declared by a separate deed, declaring such trusts, the customs of the said manors being that no trusts were allowed to be declared in the same deed by which such customary lands were conveyed, the only mode of conveyance allowed in that manor being a certain deed, resembling in form most nearly a bargain and sale strictly worded, and in form according to the custom theretofore used in passing such customary lands, without any trust being expressed in such deed of bargain and sale; that such had been the invariable practice of conveyancers in preparing deeds upon alienation of customary lands in that manor; that, in the

Read, 1 P. W. 607; Redington v. Redington, 3 Ridg. 177; Scawin v. Scawin, 1 Y. & C. Ch. Ca. 65; Shales v. Shales, 2 Freem. 252. Of course the father cannot defeat the advancement by any subsequent declaration of intention. See Williams v. Williams, *supra*; Elliot v. Elliot, 2 Ch. Ca. 221; Finch v. Finch, 15 Ves. 51; Sidmouth v. Sidmouth, *supra*; Skeats v. Skeats, 2 Y. & C. Ch. Ca. 9; Christy v. Courtenay, *supra*; Birch v. Blagrove, Amb. 266. But his evidence is admissible for the purpose of proving what was the intention at the time. Devoy v. Devoy, 3 Sm. & Gif. 403.

years 1831 and 1835, the said John Collinson agreed to purchase on his own behalf certain separate tenements and lands in the said manor of Soulby from several different separate owners, the chief part of which lands were of customary tenure, but part were of freehold tenure, intermixed with the customary in such a manner as to render it difficult to define the precise boundaries of such tenure, and so that they could not be separated without great trouble and expense, and the same were conveyed by the several assurances thereafter mentioned; that, at the time of making such purchases, the said John Collinson had several children, and being desirous of obtaining a power of disposition by will over such purchased customary lands, and to save the expense of fines to the lord of the said manor, the same were conveyed by the direction of the said John Collinson to the said Edward Dale Collinson, a son of the said John Collinson, upon trusts which were to be declared by him by a separate deed, according to the custom of the said manor, being trusts absolutely in favour and for the sole benefit of the said John Collinson; that by four several indentures of lease and release, and bargain and sale, or customary \* con- \* 411 veyance, dated respectively the 19th and 20th April, 1831; the 21st and 22d April, 1831; the 17th June, 1831; and the 6th July, 1831,—and expressed to be made by the several persons therein respectively mentioned of the one part, and the said Edward Dale Collinson of the other part, in consideration of certain several sums of money therein respectively expressed to be paid by the said E. D. Collinson to the several persons therein respectively mentioned, all those the several freehold and customary messuages, lands, tenements, and hereditaments comprised in the said several indentures, and therein respectively described, with their respective appurtenances, were respectively granted, appointed, released, surrendered, and confirmed unto the said E. D. Collinson and his heirs in the manner therein respectively mentioned, upon such trusts nevertheless as to certain of the said hereditaments and to and for such uses, ends, intents, and purposes as should thereafter be particularly mentioned and declared of and concerning the same respectively in and by four several indentures of declaration of trust which were intended to be made between the said E. D. Collinson of the one part, and the said J. Collinson of the other part; that the said E. D. Collinson was on the 17th June, 1831, and 29th July, 1831, admitted tenant of the said manor of Soulby, according to the cus-



tom of the said manor, for or in respect of the said several customary hereditaments respectively comprised in the said four several indentures; that the whole of the said several sums of money in the said four last-mentioned indentures respectively expressed to be the consideration for the said several purchases were paid by the said J. Collinson exclusively out of his own proper money, and that no part of the said several sums of money were the money of or belonged to the said E. D. Collinson, and that he,

the said E. D. Collinson, had no right or interest in the

\* 412 \* said several sums of money; that, at the time the said several conveyances were made as aforesaid to the said E. D. Collinson, he, the said E. D. Collinson, was an infant of eighteen years or thereabouts; that it was agreed and intended that so soon as the said E. D. Collinson should attain the age of twenty-one years he would execute a deed declaring the trusts upon which he held the said hereditaments and premises to be trusts wholly in favour of the said J. Collinson, his heirs, appointees, and assigns; that the said E. D. Collinson, previously to his attaining the age of twenty-one years, namely, some time during the month of February, 1834, then being an ensign in her Majesty's 99th regiment of foot, became of unsound mind, and incapable of executing such deed declaring the trusts as before mentioned; that the lunacy of the said E. D. Collinson was considered at first to be of a merely temporary character, and in consequence of such impression, by a certain indenture of bargain and sale, or customary conveyance, dated the 9th May, 1835, and expressed to be made between John Hutton, gentleman, of the one part, and the said E. D. Collinson of the other part, in consideration of the sum of 20*l.* 12*s.* 6*d.* therein expressed to be paid to the said John Hutton by the said E. D. Collinson, all those copyhold hereditaments particularly described in the now stating indenture, and comprised therein, with their appurtenances, were granted, released, and surrendered, by the said John Hutton unto the said E. D. Collinson, his heirs and assigns, in the manner and subject to the conditions therein mentioned, and that the said E. D. Collinson was, on the 18th June, 1835, duly admitted tenant of the said manor of Soulby, according to the custom thereof, for and in respect of the said customary hereditaments comprised in the said last-stated indenture,

\* 413 and that the whole of the said sum of 20*l.* 12*s.* 6*d.* \* in the said last-mentioned indenture expressed to be the consider-

ation of the said last-mentioned purchase was paid by the said J. Collinson out of his own proper moneys, and that no part thereof was the money of, or belonged in any way to, the said E. D. Collinson, and the said E. D. Collinson had no right or interest therein or thereto, and that the said last-mentioned customary hereditaments were so conveyed as aforesaid to the said E. D. Collinson by the direction of the said J. Collinson as the same were of very small value and abutted on the said other hereditaments as thereinbefore stated, and for the purpose of avoiding as aforesaid the payment of customary fines, the said J. Collinson being under the impression as aforesaid, and believing that the said E. D. Collinson was suffering under a temporary unsoundness of mind only, and the said J. Collinson intending to procure the said E. D. Collinson on his recovery to execute a deed declaring the trusts on which he held the hereditaments conveyed by the said last-stated indenture of the 9th May, 1835, as well as those expressed to have been before conveyed to him as aforesaid by the four previously stated indentures; that the said E. D. Collinson had, ever since the month of February, 1843, continued and was then of unsound mind, which had lately assumed a permanent character, and that there was then no reasonable hope or expectation of his reason ever again being restored to him, or of his recovering such infirmity; that the said E. D. Collinson never took any beneficial interest whatsoever in the said several hereditaments and premises so conveyed and assured by the said five indentures, or any or either of them, and that there was no power or authority under the same indentures, or any of them, to appoint a new trustee or trustees in his place or stead; that the said J. Collinson has ever since the said several purchases so made by him as aforesaid been, and then was, in the

\* possession of the said several hereditaments and premises \* 414

so purchased and conveyed as aforesaid, or in receipt of the rents and profits arising therefrom respectively; that the said J. Collinson was desirous of having, under the powers granted by the said Trustee Act of 1850, a person appointed in the place and stead and in the name of the said E. D. Collinson to convey and surrender the said lands, hereditaments, and premises, now vested by the ways and means aforesaid in the said E. D. Collinson, to the said J. Collinson, or as he might direct or appoint in that behalf; that the Master, upon due consideration of the evidence and facts aforesaid, was of opinion that J. Collinson was entitled

to an order appointing A. B. to convey and surrender, &c., the premises in question.

*Mr. Malins* and *Mr. Bates*, in support of the petition. — If the property had been purchased in the name of a stranger, there could be no doubt as to the title of the petitioner to the order sought, and though the purchases were made in the name of his son, yet the facts on which the Master's certificate was founded are sufficient to rebut the presumption as to advancement. The petitioner's real intention in taking the purchase in his son's name was proved by evidence contemporaneous with the purchases. They referred to and commented on the following cases: *Goodright v. Hodges*, (a) *Dyer v. Dyer*, (b) *Murless v. Franklin*, (c) *Sidmouth v. Sidmouth*. (d)

THE LORD CHANCELLOR. — Under the provisions of the 44th section of the Trustee Act, 1850, the value of the order now sought is limited to its being conclusive evidence of the \* 415 matters alleged only upon any question as \* to the legal validity of the order. I must decline, on an *ex parte* application, such as the present, to make a declaration the effect of which will be to deprive the lunatic of an estate of which he is the legal owner. He must be properly represented. The petitioner, if so advised, may file a bill or claim against the lunatic for the purpose of regularly establishing his right by evidence in the suit. The cause may be set down to be heard before me in the first instance.

In pursuance of the Lord Chancellor's suggestion, a bill was filed by J. Collinson against E. D. Collinson, stating the facts as found by the Master's certificate, so far as related to the nature of the property purchased, and the trusts upon which they were respectively conveyed and to the purchase-moneys having been advanced by the plaintiff exclusively. The bill stated that the plaintiff had been in possession, and had only been prevented obtaining a conveyance from the defendant by reason of his state of health.

The bill prayed a declaration that the defendant was a trustee of the whole of the freehold and customary hereditaments and prem-

(a) *Watk. on Copyholds*, 344, Ed. 3.

(c) 1 *Swanst.* 13.

(b) 2 *Cox*, 92.

(d) 2 *Beav.* 447.

ises, and for an order that the same might be conveyed to the plaintiff or a trustee for him.

The cause came on now to be heard before the Lord Chancellor, on motion for a decree in terms of the prayer. The plaintiff's case was supported by the evidence of the solicitor who prepared the several deeds and negotiated the purchases. The evidence was in fact the same as that upon which the Master had made his certificate.

It appeared that the defendant was born on the 17th \* October, 1818, and became of unsound mind in February, \* 416 1834, the last conveyance having been made in May, 1835.

*Mr. Giffard* appeared on behalf of the defendant, E. D. Collinson, and, being satisfied that the proofs adduced of the plaintiff's intentions were of contemporaneous acts, did not offer any opposition.

THE LORD CHANCELLOR.—I think that the evidence of the father's intention is almost irresistible, and that there must be a declaration in conformity with the prayer of the bill.

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In the Matter of PUGH, a Lunatic; and In the Matter of the Act  
16 & 17 VICT. c. 70.

1853. November 10. Before the Lord Chancellor Lord CRANWORTH.

On the petition of the lunatic's father, tenant for life of large landed estates, the Lord Chancellor declined to make an order under the Act 16 & 17 Vict. c. 70, charging the estate of the lunatic tenant in tail in remainder with a sum found by the Master to be proper for the lunatic's maintenance, there being no special circumstances nor any evidence that the state of the petitioner's family was such as to make the charge just or reasonable.

By the 116th section of the above Act it is enacted that — “ Where it appears to the Lord Chancellor intrusted as aforesaid to be just and reasonable, or for the lunatic's benefit, he may order that any estate or interest of the lunatic in land or stock, either in possession, reversion, remainder, contingency, or expectancy, be sold, or

charged by way of mortgage, or otherwise disposed of, as may to him seem most expedient for the purpose of raising money to be applied, and may accordingly order that the money when raised be applied, for or towards all or any of the purposes following: " and among these for " the payment of any debt or expenditure incurred or made after inquisition, or authorized by the Lord Chancellor intrusted as aforesaid to be incurred \* or made for the lunatic's maintenance or otherwise for his benefit; the payment of or provision for the expenses of his future maintenance." By the 117th section the modes in which future maintenance may be charged on the reversionary interest of a lunatic are pointed out.

This was the petition of the father who was the committee of the person and estate of the lunatic, and it prayed the confirmation of the Master's report. It appeared that the lunatic, who was the eldest son of the petitioner, was thirty-eight years of age, and that the estate of which he was the tenant in tail in remainder, and the petitioner tenant for life, was of the annual value of 4000*l*. The Master had found that 250*l*. a year would be a proper sum for the maintenance of the lunatic. The petition asked that that sum might be a charge, in the manner indicated in the 117th section, upon the estate in remainder of the lunatic for his future maintenance.

The petition had been originally brought before the Lords Justices, before the passing of the Act 16 & 17 Vict. c. 70, upon which occasion they suggested that the matter had better be brought before the Lord Chancellor; and that Act having in the mean time passed, the application was now renewed before the Lord Chancellor.

*Mr. J. V. Prior*, in support of the petition, submitted that if the lunatic were sane, in all probability he would for the sake of a present advance consent in effecting a charge on his estate tail in remainder.

The Lord Chancellor inquired how many children of the petitioner besides the lunatic there were living, and, upon being informed that there was no evidence on that head, observed

\* 418 that he did not think the application was \* reasonable on the part of the petitioner, who appeared to have ample

means for the support of himself and the lunatic, and that, unless a case of a very different complexion were presented to the Court, he should decline to exercise the jurisdiction with which he was invested.

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Between CHRISTOPHER TEMPLE, Esq., one of Her Majesty's  
Counsel and Chancellor of the County Palatine of Durham,  
Plaintiff; and  
The ECCLESIASTICAL COMMISSIONERS FOR ENGLAND,  
Defendants.

1853. December 10. Before the Lord Chancellor Lord CRANWORTH.

By the 6 & 7 Will. 4, c. 19, the temporal jurisdiction, including all *jura regalia* of the bishopric of Durham, was transferred from the bishop to the Crown, and by the sixth section of that Act the rights of any persons holding any office by patent were reserved, and the revenues of the see were made chargeable with the same fees and stipends in respect of any office in the county of Durham as the same had theretofore been subject to. Under the authority of the Acts constituting the ecclesiastical commissioners, and by an Order in Council in 1836, the surplus revenues of the see of Durham, after providing for the bishopric, were directed to be paid to the ecclesiastical commissioners, and such surplus was made chargeable with the payment of the fees and stipends granted out of the revenues of the see by the last or any preceding bishop to any officer of the palatinate who held his office by patent at the time of the passing of the Act 6 & 7 Will. 4, c. 19. The office of Chancellor of the Palatinate was created by patent before the time of Henry VIII., and the fees in respect of such office were about 27*l*. In the year 1788, the then bishop made a voluntary grant of 100*l*. to the Chancellor, payable out of the revenues of the bishopric, for each sitting of the Chancellor's Court, and from that period down to 1836, 100*l*. was entered in the accounts of the bishopric under the headings sometimes "new stipend," and sometimes "new stipend due this sitting." The ecclesiastical commissioners having refused to pay the present Chancellor, who was appointed in 1852, any more than the sum for which there was evidence of a grant by patent: *Held*, that, having regard to the period during which the 100*l*. had been *de facto* paid, and irrespective of the question whether the payment of that sum could ever have been enforced by action at law, the surplus revenues of the bishopric in the hands of the ecclesiastical commissioners were liable for the payment of the sum of 100*l*. for each sitting of the Chancellor.

THIS was a special case, under Sir George Turner's Act, stated for the opinion of the Lord Chancellor, his Lordship having con-

\* 419 sented to hear it in the first instance, \* and the plaintiff and defendants having agreed to be bound by his Lordship's decision.

The case stated as follows:—1. The county of Durham has from time immemorial been a county palatine, and previously to the time at which the Statute 6 & 7 Will. 4, c. 19, came into operation, the Bishop of Durham was lord of the palatinate, and by letters-patent under his seal appointed all officers of the palatinate.

2. The Chancellor of the county palatine of Durham was one of the ancient officers of the palatinate, and had full equity and other jurisdiction as Chancellor within the limits of the county, and during the time that the bishop was lord of the palatinate, the Chancellor was appointed by letters-patent, under the bishop's seal, and generally for the term of his life.

3. By the above-mentioned Act of Parliament the palatine jurisdiction and authority, and all forfeitures of lands and goods for treason or otherwise, and all mines of gold and silver, treasure-trove, deodands, escheats, fines, amerciements, and all *jura regalia* of what nature or kind soever within the palatinate, are vested in the Crown, and it is provided by the said Act, amongst other things, as follows, that nothing in the said Act contained shall affect the right of any person holding a patent of any office, whether abolished by the Act or not, to receive any fee or stipend granted by such patent out of the revenues of the bishopric of Durham, and that such revenues shall continue and be subject to all the same fees and stipends in respect of any office in the said county of Durham as the same have heretofore been subject to.

And her Majesty in 1846 appointed Sir RICHARD TORIN KINDERSLEY, now one of the Vice-Chancellors, \* Chancellor of the county palatine of Durham, and in 1851, on the resignation of Sir RICHARD TORIN KINDERSLEY, her Majesty appointed the above-named plaintiff Chancellor of the county palatine of Durham.

4. The plaintiff was appointed Chancellor of the said county palatine by her Majesty, and her Majesty, by the instrument of appointment, constituted and appointed him to be Chancellor of her Majesty's county, palatine, in the room of the said Sir R. T. KINDERSLEY, to have and to hold, exercise and occupy the said office during the term of his natural life, with all fees, wages, profits, emoluments, commodities, jurisdictions, and pre-eminences thereunto belonging or appertaining.

5. Under the authority of the Acts of Parliament relating to the ecclesiastical commissioners for England, and by the Order in Council of the 22d day of December, 1836, after transferring part of the hereditaments and possessions of the see of Durham to the bishopric of Ripon, it is provided for the purposes of the Act 6 & 7 Will. 4, c. 77, and to the intent that the Bishop of Durham for the time being, after such transfer as aforesaid, should have an average annual income of 8000*l.*, that Edward, then and now Lord Bishop of Durham, should pay out of the revenues of the see of Durham to the ecclesiastical commissioners of England the annual sum of 11,200*l.*, and by the said Order in Council it was further provided that the fees and stipends granted out of the revenues of the said see by the last or any preceding Bishop of Durham to any officer of the county palatine of Durham who held his office by patent at the time of the passing of the hereinbefore-mentioned Act of the 6 & 7 Will. 4, c. 19, should thenceforward, notwithstanding the abolition of any such office by the said \* Act, \* 421 be paid by the ecclesiastical commissioners for England out of the portion of the revenues of the said see, which should, as therein provided, be paid to them, and should continue to be so paid during such period as the interest of such officer should endure by virtue of such patent.

6. In and prior to the reign of Henry VIII., there was payable annually to the Chancellor of the said county palatine, a fee of forty marks, which amount to the sum of 26*l.* 13*s.* 4*d.* sterling, and an annual allowance of 14*s.* for white wax, making together the sum of 27*l.* 7*s.* 4*d.*, and the said sum was payable and was paid out of the revenues of the bishopric of Durham down to the time of the death of Sir CHARLES WETHERELL, the last Chancellor of the said county palatine, under letters-patent of a Bishop of Durham.

7. The Chancellor of the county palatine was formerly entitled to certain fees, of which a list was made in the year 1633, and which list is now extant; but it is uncertain at what time the Chancellor ceased to receive the said fees, and no fees have been paid to a Chancellor within the memory of any person now alive.

8. No accounts of a receiver-general of a Bishop of Durham have been found which go further back than the year 1786, but they are regular from 1786. By these it appears that from the month of March, 1788, to the time at which the before-mentioned



Act of Parliament of 6 Will. 4, c. 19, came into operation, there was paid by the receiver-general of the bishop to the Chancellor of the said county palatine for the time being out of the general revenues of the said bishopric of Durham the sum of 100*l.* for \* 422 each sitting of the \* Chancellor's Court, and such payment, together with the payment of the before-mentioned sum of 27*l.* 7*s.* 4*d.*, were allowed by the Bishops of Durham in their accounts with their receivers-general. The first entry of the payment of the said sum of 100*l.* which has been found is in the time of Bishop Thurlow, and is entered in the words and figures following, that is to say: "1788, August 29th. By Sir JOHN SCOTT, his patent fee as Chancellor, due Martinmas, 1787, 27*l.* 7*s.* 4*d.* Ditto, his new stipend, due this sitting, 100*l.*" And in the subsequent entries in the said accounts, down to the year 1836, the said two sums of 27*l.* 7*s.* 4*d.* and 100*l.* are similarly entered. It appears from the said books of account that the receivers-general received on behalf of the Bishop of Durham the sums payable to them in respect of the forfeitures, deodands, escheats, fines, and amerciaments.

9. There are in the offices of the bishop's registrar and the cursitor ancient books belonging to the palatinate, in which the said fee of forty marks is mentioned as payable to the Chancellor.

10. Sir JOHN SCOTT was the Chancellor of the county palatine of Durham in 1787, and it is in reference to a payment made to him in 1788 that the first entry of the payment of the stipend of 100*l.* is found in the said books of account belonging to the bishopric of Durham. It is stated in a memorandum to the item of the payment of the said sum of 100*l.* on the 21st September, 1791, that on the appointment of Bishop Barrington, who succeeded Bishop Thurlow as Bishop of Durham, Bishop Barrington authorized by letter the payment of the said stipend to Sir JOHN SCOTT, who and Sir JOHN MITFORD, who succeeded him as Chan- \* 423 cellor of the county palatine, \* during the time they respectively filled the office of Chancellor, held two sittings at the Chancery Court in Durham in each year, and received the said stipend of 100*l.* in respect of each sitting. Sir JOHN MITFORD was succeeded as Chancellor of the county palatine by Sir THOMAS MANNERS SUTTON, who was succeeded by Sir SAMUEL ROMILLY; and Sir SAMUEL ROMILLY was succeeded by ROBERT HOPPER WILLIAMSON, Esq., who was succeeded by Sir CHARLES WETHERELL.

Sir THOMAS MANNERS SUTTON, Sir SAMUEL ROMILLY, and Mr. WILLIAMSON, during the time they were successively Chancellors of the county palatine, held one sitting of the Chancery Court of Durham in each year, and they respectively received the said stipend of 100*l.* for each of the said sittings. Sir CHARLES WETHERELL received the said stipend of 100*l.* for every sitting of the said Court held by him up to the month of September, 1835. Sir CHARLES WETHERELL held a sitting of the said Court in September, 1835, for which he received the 100*l.*, and the before-mentioned Act passed in June, 1836.

11. Sir CHARLES WETHERELL held no sitting of the said Chancery Court after the passing of the said Act of 6 & 7 Will. 4, c. 19, but he received the annual payment of 27*l.* 7*s.* 4*d.* up to the time of his death, and the same was paid to him by the ecclesiastical commissioners from the year 1836. Sir RICHARD TORIN KINDERSLEY succeeded Sir CHARLES WETHERELL, and held either three or four sittings of the Chancery Court of Durham. Mr. TEMPLE was appointed to the office in 1851, and held a sitting of the Court in 1852.

12. No payment of 27*l.* 7*s.* 4*d.* has been made since the death of Sir CHARLES WETHERELL, and no payment of the stipend of 100*l.* has been made since the said Act of \* Parliament \* 424 passed in 1836, but the commissioners have expressed their willingness to pay the 27*l.* 7*s.* 4*d.*, but decline to pay the stipend of 100*l.*

The question for the determination of the Court was, whether, under the circumstances stated in the case, the plaintiff was entitled to demand and receive from the defendants the stipend of 100*l.* whenever he should duly hold a sitting of the Court of Chancery of the county palatine of Durham.

*The Solicitor-General and Mr. Wickens, for Mr. Temple.* — The appointment of Chancellor was clearly one of the *jura regalia* of the Crown, and the Act 6 & 7 Will. 4, c. 19, for separating the palatine jurisdiction from the bishopric, while it in terms transferred the *jura regalia* to the Crown, made the revenues of the see expressly subject to all previously existing obligations on the see; but the defendants deny that either under the Act, or the Order of Council, they are legally liable for any sum beyond that for which there is evidence of a grant by patent. There is, however,

evidence of the payment of the stipend of 100*l.* for fifty years, and that amounts to such clear proof of a *de facto* and continuous enjoyment as will dispense with the necessity for establishing a strictly legal title. On this principle Courts of Law in settling claims to compensation for the loss of offices under the 5 & 6 Will. 4, c. 76, have not exacted of persons claiming compensation very formal proofs as to title, holding that the word office was not to be construed in the strict legal sense of the word, but might include any place to which duties and profits attached. *The King v. The*

\* 425 *Mayor, &c. of Bridgewater, (a) The Queen v. The \* Mayor, &c., of Norwich, (b) The Queen v. The Mayor, &c., of Carmarthen. (c)*

*Mr. Bacon* and *Mr. Fleming*, contra, for the ecclesiastical commissioners. — The compensation mentioned in the sixth section of 6 & 7 Will. 4, c. 19, referred to the rights of such persons only as hold offices by patent; the present claim, therefore, is clearly not within the purview of that section, so as to affect the revenues of the see. The origin of the grant of 100*l.* a year was in 1788; and the claim of the plaintiff is founded merely on a letter of the then bishop, which, being a purely voluntary act on his part, could not have been enforced against his successors. No bishop has or ever had a power either to create a new office or to make an addition to the fees legally payable in respect of an existing office. *Trelawny v. Bishop of Winchester. (d)* But whether the claim for 100*l.* founded on the letter could or not be enforced against the succeeding bishops, yet the present claim for a stipend of 100*l.* for every sitting of the Court is so uncertain and preposterous as to be quite untenable.

Without calling for a reply, —

THE LORD CHANCELLOR. — I cannot say that this is a case on which I entertain any doubt at all. The ecclesiastical commissioners are in the present contest exactly in the same position as that in which the Bishop of Durham would have stood if the contest had arisen between the 21st June, 1836, the date

\* 426 \* of the Act separating the palatine jurisdiction from the

(a) 6 A. & E. 339.

(c) 11 A. & E. 9.

(b) 8 A. & E. 683.

(d) 1 Burr. 219.

bishopric, and the 13th August, 1836, when the second Act constituting the ecclesiastical commissioners was passed. There was no intention to subject the ecclesiastical commissioners to any liability to which the bishop after the passing of the first Act was not liable, neither was there any intention of exonerating them from any liability to which he was subject. Therefore the only question is the question of construction under the first Act of Parliament; namely, to what charges were the revenues of the see of Durham by that Act intended to be made liable in the hands of the bishop after the first Act had passed? Now, in my opinion, that is not to be ascertained by making out what were the precise legal charges in respect of which an action might have been maintained for fees against the Bishop of Durham. There is no preamble to the Act; but the object of the Act, as appears from the first section, evidently is to transfer to the Crown every thing connected with the palatinate, except the ecclesiastical duties, and to transfer the obligation of providing proper Courts and other temporal machinery for the discharging of the other temporal duties of the palatinate just in the same way as they had been formerly discharged by the bishop, and that the Crown should hold those rights and privileges as a distinct franchise, separate from the Crown, so that they should not, according to what would otherwise have been the ordinary effects, merge in what is called the dignity royal. The Crown, therefore, was to succeed to the right of appointing the Chancellor, with all the same incidents and privileges as appertained to the office when the bishop had been in the habit of appointing.

Now, it is said that before the passing of the Act 6 & 7 Will. 4, c. 19, all that the Chancellor could have \* claimed \* 427 against the bishop was an ancient fee of 26*l.* 13*s.* 4*d.*, together with another annual allowance of 14*s.* That may be so, and I incline to think that it is so, but for a period of nearly half a century the Bishops of Durham, out of their personal revenues, had been in the habit of encouraging the Chancellors to hold sessions by allowing them what is sometimes called "the new stipend," and sometimes "the stipend of 100*l.*" for every sitting, independently of the ancient fee. The question then is, such having been the usage for a period, practically speaking, almost beyond living memory, for nearly fifty years prior to the passing of the Act 6 & 7 Will. 4, c. 19, whether, when the legislature said

there should be transferred to the Crown all palatine jurisdiction, rights, and franchises of a temporal nature heretofore enjoyed by the Bishop of Durham, with all the same rights and privileges, did they not mean that the Crown should have the power of appointing the Chancellors with the same rights and incidents as had been actually, and in fact, enjoyed under the appointment from the bishop? I think that must have been their object, and it remains to be seen whether the language is sufficient to carry it into effect. It appears to me clearly that it is, because the Act contains in the sixth section this provision (and I leave out of consideration the question about its being a patent office, as it appears to me to be immaterial whether it is a patent office or not), "that such revenues" (that is, the revenues of the bishopric of Durham) "shall continue and be subject to all the same fees and stipends in respect of any office in the said county of Durham as the same have been heretofore subject to."

For the purpose of putting a construction upon this Act, I think the authorities quoted by *Mr. Wickens* have a considerable bearing. The revenues had been subject \* to this payment *de facto* for nearly half a century, and for obvious reasons; and just in the same way as in the Municipal Corporations Act, when compensation was provided for persons who were deprived of their offices by virtue of that Act, the Court of Queen's Bench, looking to the spirit of the Act, and upon sound principles, decided that, although in fact such persons were not then holding any office which they could have insisted upon holding for one moment against those who had appointed them, yet that, inasmuch as the operation of the Act was to deprive them of their offices, they were entitled to compensation. So, upon the same principle and by analogy to those decisions, not at all questioning that in all probability this was a payment which commenced within rather less than fifty years from the time of the passing of the Act 6 & 7 Will. 4, c. 19, this stipend having always been paid for nearly half a century, it appears to me that it comes within the enactment of the first clause, by which it was intended that the Crown should have the benefit of the office, and that it is within the enactment of the sixth section also, subjecting the revenues of the see to all previous obligations.

One word on a point which has been made, and which pressed on my mind previously; viz., that there is nothing to restrain the

person who holds the office of Chancellor of the county palatine of Durham from holding an inordinate number of Courts. No doubt that is so ; but I must assume that the legislature, when they passed this Act of Parliament, had that before their mind ; they knew that in point of fact no abuse had existed for fifty years, and they probably took it for granted, as I think they might, that no abuse would be likely to occur in future. The object of the Bishops of Durham was evidently most laudable ; it was to secure the services, as far as they could secure them, of eminent men. It was said that a Chief Justice had held that office ; and that with regard to a person holding a judicial office, it might be indecorous to give him money for holding a session. Very likely that was not thought of at the time. But then it seems to have been thought that the best thing for the county was to secure the services of eminent practitioners in the metropolis. Now, if I do not hold that this fee or stipend goes with the office, I necessarily annihilate it ; because, although I dare say that many gentlemen would volunteer for the service of their country, if it were necessary, to go down to Durham once or twice a year gratuitously, yet it would be unreasonable to expect that that should be done ; and, to secure the services of the most eminent men at the bar, a sum was fixed upon to be paid, not a very inordinate sum, but something that might make the office worth any person's acceptance. We see that the first appointment was of a man the most eminent of his day, at a time when he was Solicitor-General in 1789, or evidently Solicitor-General *designatus*. He was followed by Lord REDESDALE, who was followed by Lord MANNERS, and he was followed by Sir SAMUEL ROMILLY, and then Mr. WILLIAMSON, a local gentleman and a very eminent man, held the office, and then it was filled by Sir CHARLES WETHERELL. To secure the services of men of this sort it was necessary that there should be the means of giving them remuneration ; and I cannot feel the least doubt that when the legislature passed the Act 6 & 7 Will. 4, c. 19, they contemplated that all that had *de facto* been paid in respect of the office of Chancellor should continue to be so paid, whether or not it was a payment which the party receiving it might have been enabled to enforce by action at law against the bishop. My opinion therefore is, that the Chancellor is entitled to what is now claimed. The case will accordingly be answered \* 480

in the affirmative. Of course, if the office were at any time abused (I do not say so with reference to the present holder), the legislature which gave it could take it away.

### POWLES v. HARGREAVES.<sup>1</sup>

1853. November 7, 9. Before the Lord Chancellor Lord CRANWORTH and the LORDS JUSTICES.

The principle established in *Ex parte Waring*, 19 Ves, 344, is not to be restricted to cases of judicial insolvency.

According to the custom of dealing between a mercantile firm and one of its customers, it was the practice of the former to buy goods in this country on account of the customer (he giving his acceptances for their price), and to remit the goods to the partnership of the firm abroad, who were to sell the goods and invest the proceeds in return consignments, which were to be applied in keeping the customer out of cash advances in respect of his acceptances. The mercantile firm became bankrupts, but shortly afterwards they entered into an arrangement with their creditors, in consequence of which the bankruptcy was superseded and a composition deed executed, whereby it was provided that all claims, liens, or equities of the creditors who were the holders of bills upon any goods in the hands of the firm should be reserved, and that all questions which should arise as to the rights of such creditors should be decided according to the laws as administered in bankruptcy. The customer died in insolvent circumstances without having paid the bills. The return consignments came to the hands of the trustees under the composition deed. Several of the bills were in the hands of third parties by whom they had been discounted: *Held*, in a suit instituted by them on behalf of themselves and all the other bill-holders, that they were entitled to participate ratably in the sum realized by the return consignments without prejudice to their rights to prove for the difference under the trust deed.<sup>2</sup>

Whether, in the absence of the provision in the deed of composition that all questions as to the rights of the creditors were to be decided according to the bankruptcy laws, the bill-holders as such would have been entitled by a suit in equity to the same relief, *quære per* Lord Justice TURNER.

<sup>1</sup> S. C., 17 Jur. 1083; 23 L. J. Ch. 1.

<sup>2</sup> See *Trimingham v. Maud*, L. R. 7 Eq. 201; 19 L. T., N. S. 554; 38 L. J. Ch. 207; 17 W. R. 313; *Ex parte English and American Bank, In re Fraser, Trenholm & Co.*, L. R. 4 Ch. Ap. 49; *New Zealand Banking Corp., Levi & Co.'s Case*, L. R. 7 Eq. 449; 17 W. R. 565; *Ex parte Imbert, In re Latham*, 1 De G. & J. 152; *Ex parte Tayler, In re Houghton*, 1 De G. & J. 302; *Ex*

THIS was an appeal on the part of the defendants, George Hargreaves and Joseph Hargreaves, from a decree pronounced by the Vice-Chancellor STUART, on the 13th June, 1853.

The bill in this suit was filed by Alfred William Powles, one of the registered public officers of the Liverpool Banking Company, on behalf of the company and all other the holders of bills of exchange drawn by \* the defendants, George Hargreaves \* 431 and Joseph Hargreaves, upon and accepted by William Budd Prescott, who are, or claim to be, entitled to participate or share in the sum of 8040*l.* 6*s.* 6*d.* as in the pleadings mentioned against George Hargreaves, Joseph Hargreaves, Thomas Platt, John Hutton Crowder, and Frances Jane his wife, George Scholfield, William Wilson, and Harwood Walcot Banner.

The bill stated that in the year 1847, and for some years before, G. Hargreaves and J. Hargreaves and Thomas Platt carried on business as merchants in copartnership together at Liverpool under the style or firm of George Hargreaves & Co., and at Manchester under the style or firm of Joseph Hargreaves & Co., at Shanghai in China, under the style or firm of Platt, Hargreaves, & Co., and the said firms were one and the same trading copartnership; that the course of trade and dealing of the said copartnership with their customers was for the said J. Hargreaves to select and purchase at Manchester for the customers of the copartnership goods upon condition of such goods being consigned to G. Hargreaves & Co. at Liverpool, and to be by such last-mentioned firm shipped to Platt, Hargreaves, & Co. at Shanghai for sale, and that the said G. Hargreaves charged 1*l.* per cent commission for his exclusive benefit on the amount of the goods so purchased, and Platt, Hargreaves, & Co. sold the goods in China, and guaranteed such sales at a commission at 7*l.* 10*s.* per cent and with the amount of such sales purchased and returned other goods to G. Hargreaves & Co. at a commission of 2*l.* 10*s.* per cent; that it was also further part of the course of trade and dealing of the said copartnership with their customers to keep their customers from cash advances in respect of such goods by drawing

*parte Carrick, In re Harrison*, 2 De G. & J. 208; *In re New Zealand Banking Co.*, L. R. 4 Eq. 226, 232; *In re Joint-stock Discount Co.*, Loder's Case, L. R. 6 Eq. 491; *In re Barned's Banking Company*, *Ex parte Stephens*, L. R. 3 Ch. Ap. 753; *In re General Rolling-stock Company*, *Ex parte Alliance Bank*, L. R. 4 Ch. Ap. 423; *City Bank v. Luckie*, L. R. 5 Ch. Ap. 773.



\* 432 bills of exchange upon, and which \* were accepted by, the customers for the price of the goods, and such bills were either delivered to the sellers of the goods in payment of the same, or were discounted by bankers, and the produce applied in payment of such goods, and the understanding and agreement between the copartnership and their customers was, that the goods purchased and returned by Platt, Hargreaves, & Co. should be in the hands of G. Hargreaves & Co. as a security and indemnity to G. Hargreaves for the amount of his commission of 1*l*. per cent, and to the copartnership for the bills of exchange so drawn and accepted, and if such bills came to maturity before the return of the goods from China, the course of trade and dealing was to retire such bills and replace them by other and new bills which were to represent the former ones, and the bills, as well the old as the new bills, were sometimes drawn in the name of G. Hargreaves & Co. and J. Hargreaves & Co., and sometimes in the names of G. Hargreaves or J. Hargreaves only, but always for, or on the behalf of, the copartnership. The bill further stated that William Budd Prescott of Liverpool, merchant (since deceased), was in the year 1845, and thence down to some time in the year 1847, a customer of G. Hargreaves, J. Hargreaves, and T. Platt, and that he dealt with them under the agreement and understanding, and according to the course of trade and dealing thereinbefore mentioned, and that the defendants, G. Hargreaves, J. Hargreaves, and T. Platt, in those years purchased, through their firms of G. Hargreaves & Co. and J. Hargreaves & Co., and shipped to Shanghai, and consigned to Platt, Hargreaves, & Co., for W. B. Prescott various quantities of goods, and that W. B. Prescott accepted various bills drawn upon him by G. Hargreaves & Co. and J. Hargreaves & Co., or one of them, and that G. Hargreaves & Co. received from Platt, Hargreaves, & Co., various quantities of goods consigned \* to them on account of W. B. Prescott, and that the goods were purchased, shipped, consigned, and received for, or on account of, W. B. Prescott, and the bills were drawn upon, and accepted by him, under the agreement and understanding and according to the course of trade and dealing thereinbefore mentioned between the defendants G. Hargreaves, J. Hargreaves, and T. Platt with their customers, and that some of the bills drawn upon and accepted by W. B. Prescott were drawn for the amount of particular goods, and others for

goods generally, but that all of such bills were for goods purchased, consigned, and shipped on the account of W. B. Prescott, and that the plaintiff was unable to distinguish such bills or goods.

The bill then stated that in the month of November, 1847, the defendants G. Hargreaves, J. Hargreaves, and T. Platt stopped payment, and that in December, 1847, a joint fiat in bankruptcy was awarded and issued against G. Hargreaves and J. Hargreaves, as copartners under the styles or firms of G. Hargreaves & Co., and J. Hargreaves & Co., and a separate fiat in bankruptcy was awarded and issued against G. Hargreaves, and they were found and declared bankrupts under such fiats, but that an arrangement was subsequently come to between G. Hargreaves and J. Hargreaves with their creditors, by which a composition of 8s. in the pound was guaranteed to the joint creditors of themselves and T. Platt, and a composition of 3s. in the pound was guaranteed to the separate creditors of G. Hargreaves, and whereby it was agreed that after payment of such compositions and all expenses of the arrangement, the ultimate surplus, if any, of the assets of the co-partnership and of J. Hargreaves was to be paid to J. Hargreaves; that such arrangement was carried into effect by two composition deeds, bearing date respectively the 19th April, 1848, and \* by a deed of covenant of the same date, and the joint and \* 484 separate fiats were annulled; that by one of such deeds, namely, by the deed of covenant of the 19th April, 1848, all the joint real and personal estates of G. Hargreaves were vested or agreed to be vested in George Scholfield, William Wilson, and Harwood W. Banner, and in Elias Joseph Moztey and Charles Stewart Middleton, since deceased, as trustees for the purpose of effecting and carrying out the arrangement, and with full and ample powers subject to the trusts of the deed and of the composition deeds, to deal with and distribute such real and personal estates, and to represent and bind the creditors of W. B. Prescott parties to the arrangement, and that by the composition deeds the creditors of G. Hargreaves, J. Hargreaves, and T. Platt, and the creditors of G. Hargreaves, agreed to accept the composition of 8s. and 3s., and that in the composition deeds executed by the joint creditors of G. Hargreaves, J. Hargreaves, and T. Platt there was the following proviso: "Provided always and it is hereby agreed and declared that with respect to every bill of exchange or promissory note of the said G. Hargreaves, J. Hargreaves, and T.

Platt, held by or for the said several creditors, parties hereto of the third part respectively, and upon any of which bills or notes there are or is any parties or party prior to the said G. Hargreaves, J. Hargreaves, and T. Platt, or upon which any persons or person are or is jointly liable along with the said G. Hargreaves, J. Hargreaves, and T. Platt, or separate and apart from them or in respect of any of which bills of exchange or promissory notes the said creditors parties hereto of the third part respectively are now or, in case such fiat should not be annulled, would be entitled to any claims, liens, or equities upon goods or other property in the hands of the said G. Hargreaves, J. Hargreaves, and T.

\* 435 Platt, or any of them, all and every the \*several and respective rights, claims, and demands of them the said several creditors, parties hereto of the third part respectively, holders of such bills or notes upon or against all and every such prior or other persons or person jointly or separately liable as aforesaid, and also all and every such claims, liens, and equities as aforesaid, shall be and are hereby respectively reserved to such creditors severally and respectively, and shall continue to exist to the same extent, in all respects as if these presents had not been made and entered into and as if the said fiat had not been annulled, and shall not be in any manner prejudiced or affected by the release of the said G. Hargreaves, J. Hargreaves, and T. Platt, their respective heirs, executors, and administrators of and from all and every such bills of exchange or promissory notes hereinbefore contained, and all questions which shall or may arise between any of such creditors and the said G. Hargreaves, J. Hargreaves, and T. Platt respecting such claims, liens, and equities as aforesaid and the rights of the said creditors to participate in the composition hereby provided, shall be decided according to the laws as administered in bankruptcy in England;” that in the said composition deed executed by the creditors of G. Hargreaves there was the like provision as to any bill of exchange or promissory note of the said G. Hargreaves held by or for the covenanting parties thereto. The bill then stated that before and up to the 5th April, 1847, G. Hargreaves & Co. and G. Hargreaves had distinct and separate accounts with the said Liverpool Banking Company, but that on the 5th April, 1847, the accounts were balanced and corrected, and continued so balanced and corrected up to the date and issuing of the said fiats in bankruptcy, and the banking company had

discounted for G. Hargreaves & Co. the following bills of exchange, being three of the bills so drawn upon W. B. Prescott by G. Hargreaves & Co. and J. Hargreaves \* & Co., or one of \* 436 them, and accepted by him in the course of his dealing with the copartnership, namely, a bill dated Liverpool, 12th July, 1847, for 2000*l.*, drawn by G. Hargreaves & Co. upon and accepted by W. B. Prescott, and indorsed G. Hargreaves & Co., and due 15th November, 1847, and another bill for the like sum, and drawn and accepted and indorsed, as the former was, dated Liverpool, 18th July, 1847, and due 21st November, 1847, and a third bill for the like sum of 2000*l.*, bearing date Manchester, 26th July, 1847, drawn by J. Hargreaves alone, but on behalf of G. Hargreaves & Co. and J. Hargreaves & Co., or one of them, upon and accepted by W. B. Prescott, and indorsed G. Hargreaves, and due 29th November, 1847, and such bills of exchange were then in the possession of the Liverpool Banking Company, and had never been paid or satisfied. The bill then stated that William Wilson was, when the bills were discounted by the banking company, and was then, manager of the Liverpool Banking Company, and that before the bills were discounted, and in order to effect the same, G. Hargreaves informed W. Wilson, as such manager, of the circumstances under which the bills were drawn and accepted, and of the course of trade and dealing, and of the agreement and understanding between G. Hargreaves and J. Hargreaves and W. B. Prescott, and that the Liverpool Banking Company, by W. Wilson as their manager, discounted the bills upon the faith of the information of G. Hargreaves, and upon the full understanding and belief, and on the faith that the goods which should be purchased and returned by Platt, Hargreaves, & Co. from China, to G. Hargreaves & Co., in return for the goods shipped and sent to them by G. Hargreaves & Co., and to pay for which the bills were drawn and accepted, should be a security and indemnity for the amount of the bills at maturity, and \* that the proceeds of the goods so \* 437 returned from China should be appropriated to pay the three bills ratably with the other bills similarly situated, which were outstanding, and that neither W. Wilson nor the banking company, when the bills were discounted, had any knowledge or notice of any account subsisting between G. Hargreaves and J. Hargreaves, or either of them, and W. B. Prescott, except as aforesaid.

The bill then stated that the Liverpool Banking Company were creditors of G. Hargreaves and J. Hargreaves, and also of G. Hargreaves, upon other and distinct transactions and accounts not connected with the bills thereinbefore referred to; and that W. Wilson, as the manager of the banking company, was a party to and executed the composition deeds of the 19th April, 1848, for and on behalf of the company, in respect of such other and distinct transactions only; and that W. Wilson did not execute the deeds or either of them as a creditor; and that the banking company had not received or been paid the dividend of 8s. in the pound, or any part thereof, in respect of the bills. The bill then stated that W. B. Prescott died in the month of September, 1847, insolvent, but never having been declared by law insolvent or made a bankrupt, and administration of his personal estate and effects with his will annexed had been granted to Frances Jane Crowder, the wife of John Hutton Crowder; and that W. B. Prescott had full knowledge and notice that the three bills had been discounted by the banking company under the circumstances thereinbefore stated. The bill then stated that a large quantity of goods had arrived in Liverpool from China, purchased by Platt, Hargreaves, & Co., and consigned to G. Hargreaves & Co., on account of W. B. Prescott, in return for the goods shipped and consigned by G.

\* 438 Hargreaves & Co. to Platt, Hargreaves, \* & Co., for and on account of W. B. Prescott; and that some of such goods had arrived before and some after the date of the arrangement of the 19th April, 1848, and that part of such goods as arrived before the date of the arrangement was possessed by G. Hargreaves and J. Hargreaves, and that they sold some of them to the amount of 3804*l.* 15*s.* 6*d.*, which they had received and mixed up with their own moneys; and that part of such goods which had arrived before the said arrangement and also the goods which arrived afterwards had been possessed by G. Scholfield, W. Wilson, and H. W. Banner, as the surviving trustees of the deed of covenant of the 19th April, 1848, and that they had sold the goods so possessed by them as aforesaid for a large sum of money, and that the sum of 8040*l.* 6*s.* 6*d.* was then in their possession, the price of such goods and the accumulations thereof.

The bill prayed that it might be declared that the Liverpool Banking Company and all other the holders of the bills of exchange drawn upon and accepted by W. B. Prescott under the

circumstances thereinbefore stated were entitled to have the sum of 8040*l.* 6*s.* 6*d.* and all interest thereafter to acerue due thereon, and the accumulations thereof, paid and applied ratably amongst them in discharge and satisfaction, so far as the same would extend, of the amount of their said bills, without prejudice to their right or title to have and receive the balance or surplus of the amount of such bills and also the said sum of 3804*l.* 15*s.* 6*d.*, or a composition of 8*s.* in the pound in respect of such balance or residue and sum of 3804*l.* 15*s.* 6*d.*, as the case might be, and according to whether such holders were or were not parties to the said deeds of the 19th April, 1848, out of the joint real and personal estates of G. Hargreaves and J. Hargreaves, and that the sum of 8040*l.* 6*s.* 6*d.* might be \* paid and applied accord- \* 439 ingly; and that, for the purposes aforesaid, all necessary and proper inquiries might be made and accounts taken; and that, in the mean time, the defendants (the trustees) might be restrained from paying or distributing the said sum of 8040*l.* 6*s.* 6*d.*

The statements in the bill were generally admitted by the defendants G. and J. Hargreaves; they, however, denied that a representation had been made to the bank that the return consignments were to be a security and indemnity for the amount of the bills at maturity.

The evidence of W. Wilson with respect to the discount of Prescott's acceptances by the bank was to the following effect: "The arrangement was that the bank should take the drafts of G. Hargreaves & Co. upon certain parties named, who were parties consigning goods to Platt, Hargreaves, & Co. at Shanghae, and the proceeds of whose property were to come back into the hands of Joseph Hargreaves & Co. in Liverpool under the arrangements between G. Hargreaves & Co. and those parties that the purchasers of those goods in England should be kept out of cash advance for the purchase-money so consigned."

The deed of covenant executed contemporaneously with the composition deed by G. and J. Hargreaves contained the following provision: "Provided always nevertheless, and it is hereby declared and agreed by and between all the said parties to these presents, and the said G. Hargreaves and J. Hargreaves for themselves and the said T. Platt do hereby respectively consent, covenant, and agree that the said parties hereto of the fourth part, and the survivors and survivor of them, and the executors and admin-

istrators of such survivor or other the trustees or trustee of  
 \* 440 these \* presents, shall stand possessed of all the goods and  
 merchandise consigned to them the said G. Hargreaves, J.  
 Hargreaves, and T. Platt under their firms aforesaid or any of  
 them for sale, as commission merchants or agents, and of the pro-  
 ceeds or returns in respect of all such goods and merchandises,  
 when and as the same shall be received upon trust, after full and  
 complete satisfaction of any lien, claim, right, or title to be indem-  
 nified, or other claim, right, or title which the said G. Hargreaves,  
 J. Hargreaves, and T. Platt, their executors, administrators, or  
 assigns, or any of them, shall or may have or be entitled to into or  
 upon the said goods and proceeds, or any of them respectively, for  
 the respective consignors of all such goods and merchandises, or  
 for such other person or persons as shall or may be entitled  
 thereto."

By the decree of the Vice-Chancellor it was declared that the  
 plaintiff and the other holders of bills drawn by Hargreaves & Co.  
 on and accepted by Prescott, under the circumstances in the plead-  
 ings mentioned, were entitled to have 8040*l.* 6*s.* 6*d.*, and any inter-  
 est arising therefrom, divided ratably among them in proportion to  
 the amounts due on their respective bills, "without prejudice to  
 the right or title of the said plaintiff and the other holders of such  
 bills to have and receive the sum of 3804*l.* 15*s.* 6*d.*, the residue of  
 such moneys or a composition of 8*s.* in the pound, in respect of  
 the same, as in the pleadings mentioned, or to have their claim  
 against the parties to the bills for the balance or residue of the  
 same."

The defendants G. and J. Hargreaves now appealed from the  
 whole of that decree.

*Mr. Russell, Mr. Daniel, and Mr. H. Clarke*, for the plain-  
 \* 441 tiffs, in support of the Vice-Chancellor's decree. — "The  
 equity of the bill is founded on the doctrine clearly estab-  
 lished by Lord ELDON in the case of *Ex parte Waring*. (a) This  
 doctrine was recognized in the case of *Ex parte Hobhouse*, (b)  
 and in fact has never been impugned. The defendants rely  
 on some observations of Sir J. WIGRAM, in the case of *Lay-  
 cock v. Johnson*, (c) where he states that the rule laid down

(a) 19 Ves. 344; S. C., 2 Rose, 182; 2 Gl. & Jam. 404.

(b) 3 Mont. & A. 269.

(c) 6 Hare, 199.

in *Ex parte Waring* was only a special mode of payment in bankruptcy. The decision in that case was as to the right of bill-holders, not parties to the suit, to intervene on further directions, where the bill was filed by a stakeholder against the assignees of the drawers and acceptors to determine their respective interests on the proceeds of certain goods in the hands of the stakeholder; and though the decree disallowed the claims of the bill-holders in that cause, yet it contained a distinct provision that it was to be without prejudice to the claims of any persons who were not parties to the record upon the assignees of the acceptors in whose favour the decree was pronounced. Admitting, however, for a moment that the principle established in *Ex parte Waring* (a) is only applicable to the administration of estates under the bankrupt law, the deed of composition under which G. and J. Hargreaves' bankruptcy was annulled expressly provides for the determination of all questions which may arise between any of the creditors and G. and J. Hargreaves, by the laws as administered in bankruptcy.

[In answer to a question put by the Lord Justice KNIGHT BRUCE, the counsel for the appellants admitted that if there had been no bankruptcy, no insolvency, and no death, the property now in question would, as between \* the Messrs. Hargreaves and \* 442 Prescottt, have been clearly applicable to the discharge of the bills.]

*Mr. Wigram, Mr. Rolt, and Mr. Smythe*, for the appellants. — The plaintiff rests his claim and that of the other bill-holders first on the case of *Ex parte Waring*; (a) secondly, on the special contract. With respect to the case of *Ex parte Waring*, the rule there established is a mere arbitrary rule of law applicable to the particular state of circumstances, where two bankrupt estates have to be administered; and this is manifestly to be inferred from Lord ELDON's language when he speaks of the necessity of "clearing" the estate of Brickwood of the demand by their acceptances.

[The Lord Justice KNIGHT BRUCE referred to the case of *Ex parte Williams*, (b) and suggested that the observations of Lord ELDON there on the rights of joint and separate creditors were

(a) 19 Ves. 344; S. C., 2 Rose, 182; 2 Gl. & Jam. 404.

(b) 11 Ves. 3.



not confined to the administration of estates under the bankrupt laws.]

The reason why there must be two bankruptcies is, that in such cases there follows a statutable release from all obligations; but here Prescott, as acceptor, not having become bankrupt, his representatives can claim no interest in the proceeds of the goods without indemnifying the parties holding the proceeds of such goods against the amount of the acceptances. *Ex parte Brown.* (a)

The mere fact that the goods have been sold can make no difference as to the right of retainer; and the provision in the deed of covenant to the effect that the trustees should hold the goods or their proceeds as an indemnity against the claims \* 443 of G. and J. Hargreaves, \* excludes the notion that the bill-holders were to have any lien upon the goods. The present plaintiff, and those whom he represents, can have no higher equity than the acceptor: *Ex parte Parr*; (b) and they can only come into this Court on the allegation that his personal representative has refused to sue, which is not the fact, and this of itself constitutes a valid objection to this bill.

[Lord Justice KNIGHT BRUCE referred to *Barker v. Birch.* (c)]

No such principle as that to be found in *Ex parte Waring* exists in the administration of equity in this Court; on the contrary, the bill-holders, who are third parties, cannot assert an equity arising out of a contract between Prescott and G. and J. Hargreaves: *Garrard v. Lord Lauderdale*; (d) if the plaintiff had any such right, the result would follow that every bill-holder would have a specific lien on the goods.

[The Lord Justice KNIGHT BRUCE referred to *De Bernales v. Fuller.* (e) where money paid into a bank for the purpose of taking up a particular bill was held to be money had and received to the use of the bill-holder.]

We rely on the authority of *Laycock v. Johnson*, (g) where the Vice-Chancellor WIGRAM says: "The third question is, whether the

(a) 3 Mont. & A. 471.

(b) Buck, 191.

(c) 1 De G. & S. 376.

(d) 3 Sim. 1.

(e) 14 East, 590, note.

(g) 6 Hare, 199; see p. 209.

doctrine established by *Ex parte Waring*, and the other cases, affects the alleged rights of these bill-holders. That doctrine appears to me to make no difference for the purposes of the present suit. The creditors must be paid in the bankruptcy; and the rule laid down in *Ex parte Waring* is only a special mode of payment in the bankruptcy." It is also \* to be observed \* 444 that in *Ex parte Waring*, (a) the short bills were more than sufficient to cover the liability on the acceptances; here there is a deficiency.

Secondly, with respect to the special contract, the Vice-Chancellor was clearly of opinion that there was none: if that were proved as alleged at the bar there would be an end of the case; but so far from being proved there does not appear to be a single statement in the bill on which to support so unfounded a position, and the evidence of Wilson is the other way. As to the proviso at the end of the deed, on which reliance has been made, it is clear that the bill-holders, before they can avail themselves of that proviso, must show that they are creditors who have a lien on the goods in the hands of Messrs. Hargreaves, which is assuming the whole case. The decree is clearly wrong, in so far as it declares that the plaintiff and the other bill-holders are entitled to have the 8040*l.* divided ratably among them without prejudice to their right to prove on the 3804*l.* 15*s.* 6*d.*, not only in respect of the difference, but for the whole amount of their claim.

*Mr. Follett* and *Mr. Woodruffe* appeared for the defendants, J. H. Crowder and Frances his wife, the administratrix of W. B. Prescott, and, as the decree simply dismissed the bill against their clients, took no part in the discussion. Upon being required, however, by the counsel for the appellants to admit that the sum of 8040*l.* 6*s.* 6*d.* represented the true balance of the account between the estates of Messrs. Hargreaves and Prescott, they submitted that they ought not to be called upon to make any such admission, or any other admission than that they disclaimed all interest in the matters in the bill mentioned; and the Court so held.

\* *Mr. Bacon* and *Mr. Eddis*, for the trustees. — In the \* 445

(a) 19 Ves. 344.

course of the argument the original order as drawn up in *Ex parte Waring*, (a) was sent for. (b)

(a) 19 Ves. 844; S. C., 2 Rose, 182.

(b) 25 April, 1815. *Ex parte Waring*.—It was ordered that the order pronounced on 25th January, 1811, on the petition of Inglis and others, assignees of Bracken & Co., be varied, and that it be referred to the commissioners of bankruptcy against Brickwood & Co. to take an account of the bills outstanding and accepted by Brickwood & Co., and in whose hands such bills now are and what is now remaining due to the holders on the said bills respectively, and that the commissioners take an account of the dividends paid or now liable to be paid by the assignees of Brickwood & Co. to the said bill-holders upon the proofs made by them on the said commission, and that the short bills now remaining unpaid be forthwith sold before the commissioners under the commission against Brickwood & Co., and let the net proceeds of the short bills already received by the assignees of Brickwood & Co., and the amount of the net proceeds to arise by sale of the said short bills hereinbefore directed to be sold, and the said 2961*l.* after payment thereof of the costs and expenses hereinafter mentioned, be deducted from the aggregate amount of the bills outstanding and accepted by Brickwood & Co., and let the several holders of the said bills stand creditors under the commission against Bracken & Co., and under the commission against Brickwood & Co. for the difference in proportion to the amount of the said bills which they severally hold, and let their respective proofs be reduced accordingly under the said commissions, and let so much of the dividends which the assignees of Bracken & Co. have paid in respect of the said proofs in the sums so to be deducted be refunded to them by the said bill-holders in proportion to the amount of the said bills which they severally hold, and let the net proceeds owing from the said short bills already received by the assignees of Brickwood & Co. and the net proceeds to arise by sale of the said short bills now remaining unpaid, and the said 2961*l.* and all interest made thereof respectively by reason of the same having been invested in Exchequer-bills or otherwise, be applied in the first place in payment of the said assignees of Brickwood & Co., and of the costs and charges incurred by them in and about these applications and consequential thereon, and then in reimbursing to the said assignees of Brickwood & Co. so much of the dividends which they have paid to the said bill-holders or the said sums to be deducted from the proofs made by the said bill-holders under the commission against Brickwood & Co., and let the said assignees of Brickwood & Co. apply so much of the residue as may be required in further satisfaction of the said bills outstanding and accepted by Brickwood & Co. until the several holders of the said bills shall have received twenty shillings in the pound under and by virtue of the said securities, and let the said assignees of Brickwood & Co. pay to the assignees of Bracken & Co. what, if any thing, shall remain in their hands after satisfying the several payments hereinbefore directed, and in case the said respective holders of the said bills should be paid in full let their respective proofs under both the said commissions be expunged, but if the said securities or the proceeds thereof and interest as aforesaid shall not be sufficient to pay the said holders of the said bills

\* Without calling for a reply, —

\* 446

THE LORD CHANCELLOR. — I believe the Court has no doubt of the substantial accuracy of the decree which has been made, subject to a very slight variation which in all probability is not a variation of any thing the Vice-Chancellor intended in the decree, but some words may have crept in *per incuriam* in drawing it up. [His Lordship here recapitulated the facts of the case and proceeded.] Under these circumstances the suit has been instituted by the bank, \* who, as the holders of bills \* 447 drawn upon and accepted by Prescott, allege that they have a right to have the sum of 8040*l.* admitted to be in the hands of the trustees applied in the first instance in liquidation of the bills, and not in discharge of the ordinary debts of Messrs. Hargreaves, which were to be liquidated under the trust deed. Under the trust deed arrangements were made whereby any creditor coming in under the deed was to have 8*s.* in the pound, and the surplus was to go to the Messrs. Hargreaves, who, it was said, had lost a very large fortune in this speculation. The plaintiff's demand may be described as being in the nature of a lien on this 8040*l.*, and if that sum should not satisfy his demand, he claims to prove for the residue under the commission, or rather to be paid under the trust deed whereby the property of Messrs. Hargreaves is to be administered, just in the same way as if the fiat had not been superseded.

The equity on which the bill is framed rests upon the authority of *Ex parte Waring*; (a) the principles established in that case have been recognized for a period of now nearly forty years. In that case, which arose under the two distinct bankruptcies of Brickwood & Co. and Bracken & Co., the facts were these: Brickwood & Co. were bankers, Bracken & Co. were customers of the bank.

in full let the same be applied so far as the same will extend to pay and satisfy the said bills *pro rata*, and in such case let the said respective proofs be reduced as hereinbefore directed, and let the said bill-holders receive dividends on the residue of their said proofs *pro rata* with the other creditors under both the said commissions, the costs of all parties to be settled and taxed by the said commissioners in case the parties differ about the same, and the costs of the bill-holders to be paid to J. J., their solicitor, and the costs of the assignees of Brickwood & Co. to be paid to A. B., their solicitor, and the costs of the assignees of Bracken & Co. to A. D., their solicitor. Orders in Bankruptcy, 1815-16, vol. 138, fo. 77.

(a) 19 Ves. 344; S. C., 2 Rose, 182.

They were in the habit of getting the bank to accept largely for their accommodation, and of depositing with the bank securities to meet those acceptances. Brickwood & Co. became bankrupts in the month of July, 1810. At the time when they became bankrupts they were liable upon their acceptances in favour of Bracken & Co. to the extent of 24,000*l.*; but to meet those acceptances

they held securities which had been deposited with them to  
 \* 448 an amount which need \* not be stated in detail, but which may be assumed on the present argument, as the appellants have relied upon that circumstance, to have exceeded 24,000*l.* In less than one month after the bankruptcy of Brickwood & Co., Bracken & Co. also became bankrupts. It appears that the holders of the acceptances proved against both estates, but they said, We are not driven to take our remedy merely on the proofs against these two estates, we have a right to have applied in discharge of our acceptances those securities that were deposited by Bracken & Co. with Brickwood & Co. to meet them, Bracken & Co. being the principals, Brickwood & Co. the sureties. The question seems to have been argued very fully and at great length, and Lord ELDON held that there was such a right, — not, he said, “in the nature of a direct demand,” (a) by virtue of any distinct and independent equity existing in the bill-holders to claim a lien on that which had been deposited by the principal debtor with the surety; if that were so, they would have had a right at all times upon the bills so deposited, and to have said, Nobody shall deal with these bills except as we choose to permit, a proposition utterly untenable. But although there was no lien originally and independently existing in the bill-holders, yet Lord ELDON held that “as the estate of Brickwood & Co. must be cleared of the demand by their acceptances,” (b) the persons holding the acceptances were entitled to be paid, as the true way of arranging the equities between the estates which had to be administered. The expression “cleared” implies that it must be ascertained of what each estate consisted; now the securities which were in the hands of Brickwood & Co. could not be administered as part of their estate, — they did not belong to them; Bracken & Co., if they had remained solvent, would have been entitled, on paying the acceptances, to  
 \* 449 \* have had the securities handed over to them; and such

(a) 2 Rose, 182; see p. 186.

(b) 19 Ves. 345; see p. 350.

being their rights if they had remained solvent, those rights must be worked out, so to speak, with respect to the property held by Brickwood & Co. for a particular purpose. Lord ELDON, therefore, on applying that principle to the necessity of clearing the two estates, and as that could only be done by clearing off the acceptances, held that the securities "must be first applied to the discharge of those acceptances for the sake, not of the bill-holders, but of the house of Brickwood, who had become liable to them, and had a right to have that liability cleared away before any demand could arise for the Brackens:" *Ex parte Waring*; (a) that in truth amounted to paying off the bill-holders by means of those securities; and the plaintiff here says, that is precisely the equity on which he relies in the present suit.

The claim is resisted on two grounds, as I collect from the very able argument of the appellants' counsel. First it is said, that the principle established in *Ex parte Waring* (a) is a principle depending on the fact of there having been in that case what is called (not, I think, very happily) a "double bankruptcy;" meaning, by "double bankruptcy," a case where two distinct estates are to be administered under the operation of the bankrupt law, and that the principle is not applicable to a case like the present, where a party seeks to enforce such an equity by a suit in this Court. Secondly, it is said, that the doctrine, if applicable at all, is at least not applicable in the way sought to be applied in this case, where the securities in the hands of the deposites are not sufficient to meet the whole of the demand. With regard to the necessity for there being two distinct estates to be administered under the bankrupt law, let us \* consider first \* 450 what is the position here. I cannot, however, conceive it possible that if by bankruptcy is meant bankruptcy as technically distinguished from insolvency, there can be any thing in that state of circumstances which is necessary to the application of the principle. Insolvency is necessary for a reason that is obvious. In the present case there exists what I think is substantially a bankruptcy on the part of the Messrs. Hargreaves. There was technically and literally, as well as substantially, a bankruptcy in the first instance, but by arrangement that was superseded, and the parties substituted a private mode of liquidation, but with an

(a) 19 Ves. 344; see p. 349. S. C., 2 Rose, 182.

express and distinct proviso that all rights were to be saved, and administered exactly in the same way, as if the bankruptcy had continued. So far, therefore, as the Messrs. Hargreaves are concerned, I think the appellants are estopped from saying that there is not strictly a bankruptcy.

But then it is said that there is no bankruptcy as far as Prescott is concerned. There was not, it is true, a judicial bankruptcy; but why is it that this principle is said to be only applicable when there are two bankruptcies? Why, because if either party (the principal or the surety) is solvent there is no room for the application of the principle at all. In such a case no question can arise between the bill-holders and those who are liable upon the bills. The bill-holder gets paid in full, either by the principal or the surety; if he gets paid in full by the principal, of course he does not apply to the surety. The principal then applies to the depositor, the surety who holds the securities, and says, I have paid off all this against which the deposit was made with you by way of indemnity; I have, therefore, put myself into a position to demand the securities back again. So, also, if the principal is insolvent, and the depositor is solvent, the question does  
\* 451 not arise because the bill-holder then comes \* on the depositor. It is no answer for him to say he was only surety; if he is solvent he pays in full, but then he clearly has a right to indemnify himself by means of the deposit as far as it will extend. Therefore it is in a sense quite accurate to say that such questions arise only in the administration of two bankrupt estates; the question can alone arise where there are two estates, that of the principal and surety, both insolvent, and coming therefore under a forced administration. But whenever that state of things does arise, and whenever two estates are to be administered by some *vis major*, it is perfectly immaterial whether such administration is to be under the jurisdiction of the Court of Chancery, or of the Courts of Bankruptcy or Insolvency; exactly the same principle becomes applicable. If it were not so, the strange anomaly would arise that the property of the depositor, instead of going as it ought to pay his debts, would actually be applied in payment of the debt of the depositor. It appears to me, therefore, obvious that if Lord ELDON did use any expression that could lead to the inference that there must be two distinct bankruptcies before the principle was applicable, it was only because bankruptcy was then

in his contemplation, not that he meant it should be technically bankruptcy. As I have said, there must be an administration of two estates, both insolvent, before this equity of persons who have no distinct equity of their own, but which is enforced through the medium of the equity of other parties, can by possibility arise. It appears to me that state of things did arise here. In the Messrs. Hargreaves' case there was clearly what must be treated in every respect as actual bankruptcy: and in regard to Prescott's estate there is virtually the same thing; at the time of his death his estate was totally insolvent; it must, therefore, be regarded just in the same light as that of a certificated bankrupt; and all the equities attaching \* on it must be carried into effect, \* 452 just in the same way as if it was an estate administered in the course of the process of bankruptcy or insolvency, or in any other mode of administering an insolvent estate.

The second objection (which also presented itself to my mind before it was urged in the argument) is one which, I confess, struck me at the time as possessing considerable weight, though I have now satisfied myself to the contrary. It is this, — it was said that in *Ex parte Waring* (a) the deposited securities were more than sufficient to pay the bill-holder, and therefore the equity was got at in that way. It was said that the bill-holders had applied to the depositors, Bracken & Co., who had paid them in full, and that they, Bracken & Co., had by that means got back the whole of the short bills which they had deposited. The short bills when realized proved more than sufficient to pay the whole of Brickwood & Co.'s acceptances, and therefore it was necessary for Bracken & Co.'s security that this operation should have been gone into, because they otherwise could not have got back the surplus value of the short bills deposited. It was argued that that equity was got at on the assumption that the bill-holders stood in the position of the surety, and only through the medium of the principal debtors, Bracken & Co., who had made the deposit. Therefore it was said that such an equity could not be applied in this case, because here you cannot take the goods which were deposited out of the hands of the depositors without indemnifying them; that is, without paying the bills in full, which, if (as in the present case) the deposits are insufficient for the purpose, is not

(a) 19 Ves. 344; S. C., 2 Rose, 182.



to be contemplated. I confess I was at first a good deal struck with that argument. With the view of ascertaining exactly what was done in *Ex parte Waring*, (a) and \* whether the order as drawn up in that case would throw light upon the subject, we sent for the order itself. It may, I think, be inferred from the judgment in the report of that case, that the securities deposited were more than sufficient to satisfy the bills. I do not know that that distinctly appears in the report, but whether it was so or not is immaterial, because the order itself (which I must assume was very fully considered, for Lord ELDON directed the attention of Mr. Cooke to the mode in which it was to be drawn up) distinctly provided for the case of the short bills deposited either being equal or more than sufficient, or being insufficient; and expressly provided that, if insufficient, the parties holding the acceptances were to prove for the deficiency. Is that at all surprising when we consider the case a little more closely? That of necessity must be the equity; because, when as in the present case the goods were deposited under circumstances that the parties with whom they were deposited had a right to hold them as security, it is to be observed that from the nature of the transaction it was meant either by express contract, or in the ordinary course of dealing with the property, that it should be turned into money: when that is done it is absurd to speak of holding 8000*l.* by way of security for being paid 16,000*l.* That is not the course of dealing. When it is once said that goods or bills are deposited by way of security on a contract that, when the proper time arrives, those securities are to be realized and turned into money, what is necessarily meant is that the money is then to be applied, just as property sold under a power of sale in a mortgage is to be applied, in liquidating the demands for which it is a security if sufficient; if not sufficient, in liquidating such demands *pro tanto*.

\* 454 It seems to me, therefore, that the circumstance of \* the proceeds of the remittances here not being sufficient does not at all vary the equity of the case, but that the right of the bill-holders is just as it would be if the securities had been more than sufficient to satisfy their bills, as it was held in the case of *Ex parte Waring*, (a) if there the securities had been insufficient. The plaintiff and those on whose behalf he sues are entitled to

(a) 19 Ves. 344; S. C., 2 Rose, 182.

have what is in specie, namely, the 8040*l.*, applied in the first instance in liquidating their demands, and following the principle of *Ex parte Waring*, (a) they are to be at liberty to prove for the deficiency.

We propose to leave the decree substantially as it was, except that after declaring the rights of the parties in the way in which the Vice-Chancellor has declared them, the decree as drawn up now goes on "without prejudice to the right or title of the said plaintiff and the other holders of such bills to have and receive the sum of 3804*l.* 15*s.* 6*d.*, the residue of such moneys" (that is, the property sold before the bankruptcy on which they clearly have no claim), "or a composition of 8*s.* in the pound in respect of the same." We think that part of the decree must be varied by substituting a clause to the effect that the decree is to be without prejudice to the parties making such claim for the balance as they may be entitled to under the trust deed, in order to exclude the notion that they can prove for any thing more than the balance.

THE LORD JUSTICE KNIGHT BRUCE. — How this case would have stood if Mr. Prescott had not died insolvent before the bankruptcy of the firm of Hargreaves, I think it unnecessary for me to give an opinion; for it is an admitted fact that, before the bankruptcy, Mr. Prescott had died insolvent. It may, perhaps, \* be material also to bear in mind that of the goods of \*455 which the proceeds are now in question, none had been sold before the bankruptcy. A portion of these goods was specifically in the possession of the firm of Hargreaves before and at the time of the bankruptcy. The other portion was never so, but reached the hands of the assignees after the bankruptcy, and was, with the other portion, sold, not by them, but by the trustees under the composition deed, and the sale took place without the participation, authority, or consent of any personal representative of Mr. Prescott, although not one of the bills in question drawn by the firm of Hargreaves (as sureties in effect for Prescott) had or has been paid. Not only, however, does neither of the defendants, Mr. and Mrs. Crowder (that lady being now the personal representative of Mr. Prescott), oppose the claim made in this suit by the plaintiffs, but Mr. Crowder also, who, as the husband of the administratrix,

is substantially the administrator, disclaims all interest in the matters in the bill mentioned.

By the express contract of the appellants with the plaintiffs, the rights of the plaintiffs in respect of the subject in dispute are to be considered and dealt with as if the bankruptcy had not been annulled, but had proceeded and were still in force.

The question therefore is, what would have been the rights—the enforceable rights—of the plaintiff if the bankruptcy had continued? And that point cannot properly be considered without ascribing to the assignees the sale in effect made by the trustees. It must, therefore, for every purpose, be taken as if the assignees, continuing to be assignees, had sold the goods in the manner already mentioned in which the trustees did sell them.

\* 456 \* That being so, can there be any reasonable doubt on the part of any person conversant with the doctrines or practice of this Court as to what would have been the remedy administered in bankruptcy if a petition in the bankruptcy had been presented by the present plaintiffs? In every possible view the plaintiffs could be creditors under the bankruptcy, and have a right to be heard before the Court in bankruptcy for the purpose of procuring and securing a due administration of the bankrupt's estate. Could it be consistent with a due administration of the bankrupt's estate that the proceeds of the goods, sold in the manner I have mentioned, should be otherwise applied than for the purpose of paying the bills so far as those proceeds would extend? It would have been a disgrace to the administration of justice if any substantial difficulty could have been reasonably suggested on such a point. Of course they had a right to present a petition; and of course the effect of presenting it would have been to ascribe and apply the clear proceeds of the goods sold after the bankruptcy to the payment of the bills, so far as those proceeds would extend, with liberty to prove for the difference.

But (as I have already said, and as the Lord Chancellor has stated) by express contract the rights are to be dealt with as in the case of a bankruptcy. I confess that to my apprehension a clearer cause, not only in point of common sense and common honesty, but in point of equity, has not often been brought before a Court of justice. The decree therefore is substantially right; right probably on every point submitted to the Vice-Chancellor, and which the Vice-Chancellor meant to decide, and only to be

varied in that slight and verbal manner to which his Lordship has alluded.

\* I suppose the Lord Chancellor to intend that this should \* 457 not vary the costs, but that the appellants should pay the costs of the appeal. In that view I entirely concur.

THE LORD JUSTICE TURNER. — If it had been necessary in this case to determine the question whether the bill-holders, the plaintiffs, had a separate and independent right to sue in respect of these matters, I certainly should have hesitated a long time before I should have affirmed that right, and should at all events have desired further time to consider the question. But this deed which regulates the rights between these parties contains an express proviso that every thing in respect of these matters shall be adjudicated upon as if the fiat in bankruptcy had proceeded; and that therefore brings the case directly within the doctrine of *Ex parte Waring*. Now, the order in *Ex parte Waring* is distinct to this effect, that if the securities in the hands of Brickwood & Co. were insufficient to pay the bill-holders, the bill-holders should prove against the estate of Brickwood & Co. and Bracken & Co. for the amount of the difference. Therefore that order seems to settle the rights between the parties.

It is said, however, that the order is not consistent with what fell from Lord ELDON in his judgment in the case. It is impossible to suppose that an order of so much importance and so well considered by Lord ELDON could possibly have passed *per incuriam*; and I am by no means satisfied that the order is not in every respect well founded in practice, and in right, and in law: for the plain fact is, that the estate which is bound to indemnify does in truth pay by virtue of the proof against it as much as can possibly be paid by it.

\* Then it is said it is necessary there should be two bank- \* 458 rupts, or two bankrupt estates, in order to bring into action the rule laid down in *Ex parte Waring*. The answer to that argument is, that there are in truth one bankrupt and one utterly insolvent estate, and it can make no difference in the application of the rule that the one estate is to be administered in bankruptcy, and the other is an insolvent estate, to be administered through the medium of the Court of Chancery. The principle on which this rule is founded appears to me to be this. There are two parties

liable on the bills of exchange. One of those parties holds securities for the payment of the bills. The other party has a right to insist that the property held as security shall be applied to the payment of the bills. He may sue in equity for the purpose of enforcing that right. If he does, the security must be applied accordingly. It cannot be applied for the benefit of the general creditor of the party who is bound to indemnify, because the party who is to be indemnified has a right and an interest in the application of it to the indemnity which he has stipulated for; and the consequence therefore is, that the proceeds of it must be applied, not to the general creditors of the party who is indemnified, but to the demand which is indemnified against. It seems to me that this principle must apply equally whether there are two estates to be administered in bankruptcy, or one in bankruptcy and one in the Court of Chancery.

I think therefore that the decree is quite right with the alteration that has been suggested.

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- \* 459 \* In the Matter of The SEA, FIRE, AND LIFE ASSURANCE COMPANY, and of The JOINT-STOCK COMPANIES WINDING-UP ACTS, 1848 and 1849.

### GREENWOOD'S CASE.

1854. February 15, 22. March 1, 8. Before the Lord Chancellor Lord CRANWORTH and the LORDS JUSTICES.

A company completely registered under the provisions of the Joint-stock Companies Registration Act (7 & 8 Vict. c. 110), was ordered to be wound up: various proceedings were taken to get in the assets, but without success: costs were incurred, and at last it became necessary to provide the official manager with funds to pay these costs and to prosecute his duties generally: for this purpose a call was made on all persons without distinction whose names were on the list of contributories, some having paid and some having not paid the original deposits on their shares: *Held*, on an application to discharge the call, by one of the persons who had paid his original deposit, that the call was properly made.<sup>1</sup>

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<sup>1</sup> See cases cited in note to Gay's Case, 1 De G., M. & G. 347; Prichard's Case, 5 De G., M. & G. 484; Underwood's Case, 5 De G., M. & G. 677; Royal British Bank v. Turquand, 5 Ell. & Bl. 248, 260.

Gay's Case, 1 De G., M. & G. 347, observed upon.

The Court would not be inclined to interfere with a call properly made merely on the ground that the amount had been estimated at too large a sum. *Semble*.<sup>1</sup>

On a question raised that by one of the clauses of the deed of settlement of the company the liability of the shareholders to third parties was limited to the amount of their shares: *Held*, that such could not be the real meaning of the clause, having regard to the powers conferred by the other clauses of the deed for the conduct of the business of the company.

Supposing, however, that the meaning of the clause had been to limit the liability as to third parties: *Held*, that the creditors of the company would not, by the operation of the clause and of the Joint-stock Companies Registration Act, lose their right to proceed against the shareholders beyond the amount of their shares.<sup>2</sup>

The general liability of partners to creditors is not materially affected by the provisions of the Joint-stock Companies Registration Act: the effect of the 25th and 66th sections considered.

The decisions in *Ridley v. The Plymouth Grinding and Baking Company*, 2 Exch. Rep. 711, *The Kingsbridge Flour Mill Company v. The Plymouth Grinding and Baking Company*, 2 Exch. Rep. 718, and *Smith v. The Hull Glass Company*, 8 C. B. Rep. 668, 11 C. B. Rep. 897, observed upon.

THIS was an appeal by the official manager from the decision of Vice-Chancellor STUART, reported in the second volume of Messrs. Smalé and Giffard's Reports, page 95. Without repeating the facts, which will be found there fully stated, it may be sufficient to mention that the company, which was formed with a capital of \*100,000*l.*, divided into shares of 1*l.* each, was \*460 completely registered under the Act 7 & 8 Vict. c. 110, and a deed of settlement was duly executed. The company was being wound up, under an order dated the 1st June, 1850. Many of the shareholders had not paid up the amount due on their shares; and, the official manager not having been able to obtain any assets, it became needful to provide funds to meet the costs and charges of the proceedings under the order. For this purpose a call of 1*l.* per share was made by the Master on all the contributories generally; and Mr. Greenwood, whose name was included in the list of contributories as the owner of twenty-five shares, in respect of which he had paid the full amount due,

<sup>1</sup> See *Jones v. Sisson*, 6 Gray, 288; *Fayette Mut. Fire Ins. Co. v. Fuller*, 8 Allen, 27; *People's Mut. Eq. Fire Ins. Co. Pet.*, 9 Allen, 319; *In re Contract Corporation*, L. R. 2 Ch. Ap. 95.

<sup>2</sup> See 2 Lindley Partn. (Eng. ed. 1860) 1141; *In re Professional Life Ass. Co.*, L. R. 3 Ch. Ap. 167; *In re Albert Life Ass. Co.*, L. R. 9 Eq. 706.

appealed against the call. (The form in which the call was made, and the terms of the motion to discharge it, are noticed in the judgment of the Lord Justice KNIGHT BRUCE, *infra*, pp. 484, 485, 486.) The Vice-Chancellor discharged the call; and, holding that the deed of settlement of the company limited the liability of the shareholders to the amount of their shares, intimated his opinion to be that the shareholders who had paid the full amount due in respect of their shares were not liable for the debts of the company, or for the call.

The order of the Vice-Chancellor was in the following terms: "Upon hearing the deed of settlement of the said company, and the proceedings on the file in the said Master's office, and the books of the said company read, and what was alleged by the said counsel for the said William Greenwood, and the official manager, this Court doth order that the order made in this matter by the Master charged with the winding up of the said company bearing date the 20th day of June, 1853, be discharged. And it is ordered that the official manager do on or before the 11th day of March next repay to the said William Greenwood, and all other \* 461 persons who had \* paid one pound per share, being their proportion of the capital according to the deed of settlement, the moneys received by him for calls in pursuance of the said order. And it is ordered that the said Master do revise the list of contributories of the said company, so as to distinguish and put in a separate class those of the said contributories who have paid the said one pound per share, being their proportion of the capital of the said company, from those who have not paid the same. And this Court doth declare that the creditors of the said company have not established against the contributories of the said company any liability for payment of the debts beyond the amount of the capital paid or payable by each shareholder therein according to the deed of settlement of the said company. And it is ordered that the Master do proceed to wind up the affairs of the said company having regard to the aforesaid directions and declaration."

From this order the official manager appealed, and the case came on to be argued before the full Court of Appeal.

*Mr. Daniel*, in support of the appeal. — The Vice-Chancellor decided this case on the ground that the eighty-ninth clause of the

company's deed limited the liability of the shareholders as to third parties, and that the Joint-stock Companies Registration Act (7 & 8 Vict. c. 110) operated as a notice of that limited liability to all parties dealing with the company, so that in fact the clause might be considered as imported into every contract made by the company. The appellant, on the contrary, submitted that, according to the true construction of the deed, no such limited liability as that contended for was intended, but even if it were, such a provision could only affect the members of the company \* *inter se*, and could in no way be imported into contracts \* 462 with third parties. The Act was never intended to have the operation attributed to it by the Vice-Chancellor, as was conclusively shown by the terms of the twenty-fifth section providing for the incorporation of Joint-stock Companies, which expressly declares that such company shall continue so incorporated until it shall be dissolved and all its affairs wound up, "but so as not in anywise to restrict the liability of any of the shareholders of the company under any judgment, decree, or order for the payment of money which shall be obtained against such company or any of the members thereof in any action or suit prosecuted by or against such company in any Court of Law or Equity ; but every such shareholder shall in respect of such moneys, subject as after mentioned, be and continue liable as he would have been if the said company had not been incorporated." The liability of a shareholder in a company constituted under that statute did not differ from that of a shareholder in a company at common law. *Thompson v. The Universal Salvage Company*, (a) Wordsworth's Law of Mining, &c., and General Joint-stock Companies, p. 92, ed. 6. The decision in *Lord Talbot's Case* (b) had been relied on before the Vice-Chancellor, but there the individual liability of the shareholders was excluded by the express terms of the contract. With regard to the call, the official manager had made out before the Master a clear case of necessity, and any inequality of payment, which there might apparently be as between the different shareholders, would be set right by the ordinary balance order. The principle laid down in *Preece and Evans's Case* (c) would govern the present. [He referred to the fourth, sixteenth, thirty-first,

(a) 3 Exch. 310.

(c) 2 De G., M. &amp; G. 374.

(b) 5 De G. &amp; S. 386.



thirty-second, thirty-third, thirty-fourth, thirty-sixth, thirty-  
 \* 463 \* seventh, thirty-eighth, forty-third, forty-fourth, (a) forty-fifth, eighty-ninth, (b) and ninety-fourth clauses of the company's deed of settlement.]

*Mr. Willes*, on the same side. — He cited, as to the rights of creditors at common law in reference to the provisions of the Winding-up Acts, *Marson v. Lund*, (c) *Prescott v. Hadow*; (d) and as to the possibility of shareholders limiting their liability to the creditors, *Furnivall v. Coombes*, (e) *Hallett v. Dowdall*. (g)

\* 464 \* He submitted that the eighty-ninth clause of the deed carried the matter no further than the ordinary form of these deeds always did; that it created no contract of limited liability with third parties; and that to hold it to do so was inconsistent with the powers given by the thirty-third, forty-fifth, and other clauses of the deed.

*Mr. Roxburgh*, on the same side. — He submitted, on the ques-

(a) This clause was as follows: "44. That the directors shall, and they are hereby authorized to make and issue, indorse and accept, in the name of and on account of the company, such bills of exchange and promissory notes as they may think expedient, provided that the total amount of such bills and notes due at any one time shall not exceed the sum of 100,000*l.*; and all such bills and notes, and no other, shall be binding on the company and on the shareholders and each of them to the extent of the respective shares held by them in the capital stock of the company, and no further or otherwise."

(b) This clause was as follows: "89. That, on and after complete registration of the company, there shall be paid by the shareholders, on execution by them of these presents, or any deed of accession thereto, or duplicate thereof, in full of all future calls and instalments, the whole of the sum or sums representing the amount of their subscription towards the capital stock of the company, at and after the rate of 20*s.* in the *l.* on the declared value of each share; and that, on payment thereof within the time hereinafter limited for the same, no further call shall be made on any shareholder in respect of the share or shares subscribed for or held by him under the provisions of these presents; and that every shareholder shall be entitled to receive from the company interest at and after the rate of 5*l.* per cent per annum, payable half-yearly (irrespective of any profits to be declared on the capital of the company in manner hereinbefore directed), in proportion to and *pro rata* for the number and amount of shares in the capital stock subscribed for and actually paid up by him."

(c) 13 Q. B. 664; 16 Q. B. 344.

(d) 5 Exch. 726.

(e) 6 Scott, N. R. 522; 5 M. & Gr. 736.

(g) 21 Law J., Q. B. 98.

tion of the call, that it was necessary to enable the official manager to proceed with his duties, and that the Master had exercised a sound discretion in the order which he had made.

*Mr. D. Power* appeared for a creditor of the company, and desired permission to address the Court in support of the appeal, but their Lordships thought he was not entitled to be heard.

*Mr. Elmsley*, for *Mr. Greenwood*, and in support of the order of the Vice-Chancellor. — It is submitted that neither at law or in equity is *Mr. Greenwood* liable for this call, and that, having paid up the full amount due on his shares, he has discharged all that he is liable for, both to his fellow-shareholders and also to the creditors of the company. According to the true construction of the deed, the directors of the company have no authority to render the members who have paid up what is due on their shares liable to creditors; and third parties dealing with the directors are as much bound by the deed as if they had actually executed it. This is not the case of an ordinary partnership; it is a partnership formed under the provisions of the Act 7 & 8 Vict. c. 110, and the object of that Act was to do away with all questions of implied authority in the directors, and to give them an express authority \* to act on behalf of the whole body, providing at \* 465 the same time that all persons dealing with them should have notice of this authority. The preamble of the statute, and the provisions made in the seventh section and in schedule A in reference to the deed of settlement, show the intention to be to afford the fullest means to persons dealing with companies formed under the Act of knowing the terms on which they are so dealing; and of these terms a creditor is bound to take notice. *Alexander v. Mackenzie.* (a) The words of the twenty-fifth section have been referred to on the other side, as showing that it was not intended to limit the liability of shareholders; but all that is there meant is to provide that the liability under any judgment or decree, whatever it be when it is once ascertained, is not to be limited by the Act: but the liability itself is not there defined; that must depend upon contract, and contract alone. The effect of the Act is to provide that all contracts must be made with the directors, and to give notice to

all persons dealing with the directors of the extent of the authority which those directors have. [He referred to the eighteenth, sixty-sixth, sixty-seventh, and sixty-eighth sections of the Act, and to *Lord Talbot's Case*. (a)] With regard to authority, although there is no decision on the point, several Judges have expressed opinions in conformity with the view now contended for. [He here referred to the judgments of Sir JOHN JERVIS and Mr. Justice MAULE in *Smith v. The Hull Glass Company*, (b) to Mr. Baron PARKE's judgment in *Ridley v. The Plymouth Grinding and Baking Company*, (c) and to Mr. Baron ALDERSON's judgment in *Hallett v. Dowdall*. (d)] The present case falls clearly \* within the principles of *Lord Talbot's Case*. (a) It was said on the other side, that to limit the liability under the eighty-ninth clause would be inconsistent with the powers given to raise money, &c., by other clauses in the deed; but those powers have reference only to pledging the property of the company, and not to the individual credit of each shareholder. The call for costs was premature, because there were contributories who had not paid up what was due from them originally on their shares. *Hunter's Case*, (e) *Gay's Case*. (g)

*Mr. W. Bovill*, on the same side. — Assuming that under the deed the liability of the members of this company is limited, and assuming the decision in *Hallett v. Dowdall* (d) to be law, the result must be the same as if the deed was incorporated into each contract entered into with the company, and that the creditor had therefore express notice of the restricted liability. *In re The Worcester Corn Exchange Company*. (h) Any person dealing with the directors of a joint-stock company knows that he is dealing with persons acting under special authority, and he is therefore bound to inquire into the nature and extent of that authority. *Attwood v. Munnings*, (i) *Alexander v. Mackenzie*. (k) The means of obtaining information is given under the Act by the deed of settlement, and to this it is in the power of every one to refer. The dicta of the Judges, in the cases already referred to,

(a) 5 De G. &amp; S. 386.

(b) 11 C. B. 897, pp. 925, 927.

(c) 2 Exch. 711.

(d) 21 Law J., Q. B. 98.

(e) 1 Sim. N. S. 435.

(g) 1 De G., M. &amp; G. 347.

(h) 3 De G., M. &amp; G. 180.

(i) 7 B. &amp; C. 278.

(k) 6 C. B. 766.

support this view of the law ; I refer to the judgment of Mr. Baron PARKE in *Ridley v. The Plymouth Grinding and Baking Company*, (a) and in the case immediately following of *The Kingsbridge \* Flour Mill Company v. the same Baking Com-* \* 467  
*pany*, (b) where his Lordship says, " You cannot make persons liable as contracting parties without showing that they directly or indirectly authorized the contract. Now, according to the terms of the deed, it would have been sufficient if five directors had authorized the secretary, or a servant, to purchase the flour, or if they had ratified the acts of those who did order it ; but no such proof is given," thus showing that the powers of directors and liability of shareholders must depend on the terms of the deed of settlement of the company. In *Smith v. The Hull Glass Com-*  
*pany*, (c) Lord TRURO, referring to the Act 7 & 8 Vict.'c. 110, says, " What, then, is the effect of that statute ? It enables certain copartnerships to obtain a certificate of complete registration, and then confers upon them certain powers. But, in order to obtain such certificate, they must comply with several conditions imposed, one of which is, that they must execute a deed containing various matters specified in the Act ; and such companies are required to appoint not less than three directors for the conduct and superintendence of the execution of the affairs of the company ; and, after complete registration, the directors are, by sect. 27, empowered, 1st, To conduct and manage the affairs of the company according to the provisions and subject to the restrictions of that Act, and of the deed of settlement, and of any by-law, and for that purpose to enter into all such contracts, and do and execute all such acts and deeds as the circumstances may require. The directors, then, are to conduct and manage the affairs of the company, subject to the restrictions of the deed of settlement, or any by-law ; and the first question arising out of that enactment \* is, \* 468  
 whether parties contracting with the directors in matters relating to the copartnership business are bound, when seeking to enforce their contracts, to show that they, the directors, were authorized by the deed or by-laws to enter into them. It is said that they are so bound, because copies of the deed and the by-laws are to be registered, and may be inspected by any person on payment of a small fee. But it seems to us that the directors, unless

(a) 2 Exch. 711, p. 716. (b) 2 Exch. 718. (c) 8 C. B. 668 ; see p. 676.

restrained by the Act of Parliament, or the deed, would have all the authority given to partners by the rules of the common law. *Prima facie* they would, as directors, have that authority. The plaintiff, then, in this case having proved that his goods were supplied to the directors upon their authority, a contract to pay for them would be implied. It may be true that such *prima facie* case might have been rebutted by showing that the directors were restrained by the deed (the Act of Parliament imposes no such restraint) from making such contract on behalf of the shareholders. But if the deed contained no such restraining clause, the authority would exist. And the plaintiff cannot be called upon to prove the negative; viz., that the deed contains no such clause. The defendants, if they rely upon a restriction, should have proved its existence. The effect of the registration of the deed and by-laws might be to affect all parties contracting with the directors with notice of their contents, and, therefore, of any restrictions imposed upon the directors with reference to making contracts; but still the burden of proving the existence of such restrictions would lie on the defendants."

[THE LORD JUSTICE KNIGHT BRUCE.—Your argument is, that every man dealing with a joint-stock company is bound to know  
 \* 469 all the stipulations of the deed of settlement. This is a startling proposition; consider how many persons there are who go into a shop or counting-house without knowing whether a joint-stock company can or cannot exist without a deed. In *Smith v. The Hull Glass Company*, (a) Mr. Justice MAULE says: "The case differs in no respect from the ordinary one of dealings at a shop or counting-house: the customer is not called upon to prove the character or the authority of the shopman or clerk with whom he deals; if he is acting without or contrary to the authority conferred upon him by his employers, it is their own fault." A case may be put of this kind: a company is formed north of the Trent for smelting iron, and for this purpose requiring ironstone; it is carried on under a deed, one of the stipulations of which is, that no ironstone is to be purchased south of the Trent: the directors make a contract for ironstone south of the Trent: can or cannot the vendor recover against the company?]

(a) 11 C. B. 897; see p. 928.

*Mr. W. Bovill.*—I should say not. If the directors went to make the contract with the deed in their hands, it would be clear that he could not; and the result must be the same if, instead of showing the deed, the directors inform the person contracting with them that they are acting under a special authority. This would be notice; and what the law does is, by means of the Act, to give notice. Admitting that there is no direct decision on the point, we submit that the whole tenor of the case of *Smith v. The Hull Glass Company*, (a) as it appears in the two reports, is in our favour. In *Hallett v. Dowdall*, (b) Mr. Baron ALDERSON says: "Notice that there are directors is notice to a party that he \* is not dealing with an ordinary partnership. When \* 470 once you show that there is a limited authority the question is, whether the party who relies on the act of the directors to bind the rest must not show the extent of the authority given to them? Is not the *onus* of proof shifted?" There are thus dicta of learned Judges in favour of the view for which I am contending, and there are none against it. I will now put a case, and see what answer can be given to it on the other side: A. and B. are partners in a trading concern in which they are to share the profits equally; they enter into a contract with C. upon the express terms that they are not to be liable under it for more than 100*l.* each: to this there could be no objection at law. Now suppose, instead of entering into this express contract, they execute a power of attorney to Z., to make a contract for them on the same terms: Z. goes to C., and enters into a contract, which he says he will sign *per procurationem*, thus showing that he is acting under a special power: how would this second case differ from the first? The general partnership law is contravened by each, and each depends on special circumstances and provisions. [He also supported the argument of *Mr. Elmsley* in reference to the construction to be put on the twenty-fifth section of the Act, and referred to the cases of *Hassell v. Merchant Traders' Ship Loan and Insurance Association*, (c) and *Halkett v. the same Association*, (d).]

*Mr. Freeling* appeared for Mr. Gwynne, another contributory, but abstained from taking any part in the argument on the under-

(a) 8 C. B. 668; 11 C. B. 897.

(c) 4 Exch. 525.

(b) 21 Law J., Q. B. 98; see p. 105.

(d) 4 Exch. 529, note (c); 18 Q. B. 960.

standing that the call, the order for which was sought to be discharged, was clearly for costs only.

- \* 471     \* *Mr. Daniel* commenced his reply, but was stopped by the rising of the Court.

March 8.

THE LORD CHANCELLOR. — The length of time during which this case has been before us in argument, has afforded the Lords Justices and myself such ample opportunity to consider the matter, and to look into the authorities, that we think we need not trouble counsel to reply. The result is that, with all respect to the learned Vice-Chancellor from whose judgment this is an appeal, we have come to the unanimous opinion that the judgment below cannot be supported.

The case arose thus: An order was made for winding up a company, called the Sea, Fire, and Life Assurance Company. It was evidently a sort of bubble company: there were to have been a hundred thousand shares, but nothing like that number were subscribed for, and still fewer were paid up. The order for winding up was made by the Lord Justice KNIGHT BRUCE, when Vice-Chancellor, in 1850, but no assets were collected. In the course of the judgment below it seems to have been supposed that the official manager neglected his duty, or at all events was slothful in not taking steps to get in the assets; but I am satisfied that would not have been the opinion of the Vice-Chancellor if the whole matter had been fully before him, and investigated as it has been before us, for it is quite clear that the official manager could do nothing more than he did. Every thing took its proper course, and we think it fair to say that the official manager stands entirely absolved from any such charge. Several attempts having been

- \* 472 made \* to get in assets, costs were necessarily incurred, and it thus became needful to have a sum of money raised for the purpose of providing the official manager with funds, so that he might be able to prosecute the duties imposed upon him. Without going through all the details, it is sufficient to mention that it was eventually considered by the Master necessary to raise a sum of 1000*l.* at the least, in order to enable the official manager to proceed safely, and for that purpose a call of 1*l.* per share was made, which, together with the money it was reasonable to antici-

pate might be recovered from those members who had not paid up their shares, would be sufficient to provide the amount required. The call was therefore made and enforced; and in point of fact, from some parties who were supposed to be insolvent or nearly so paying more than was expected, and other circumstances, a sum of 1700*l.*, instead of 1000*l.*, was actually realized. The question now raised is, whether it was proper to make the call. It seems to be clear that it was absolutely necessary that the money should be provided, and it could only be obtained by raising it from those whose affairs as partners were being wound up (treating the case as if a bill had been filed against them), and the share which each was to pay could only, in the first instance, be determined by reference to what would have been the liability of each if there had been any dealing, and by looking at the number of shares which each held. Any injustice which might be thus produced would be rectified afterwards by what are termed balance orders, fixing upon each party what, as between himself and the other partners, he was justly liable to pay; but in the mean time the money is taken, as it were, on account. All that could be done at first was to raise the fund required from those who were clearly liable. This seems to be the course which was actually followed; all the contributories were fixed, and endeavours were

\* made to get from those who had paid nothing what they \* 478  
 were bound originally to pay in respect of their shares, and also the call newly imposed. Thus, supposing there was nothing special in the case, there can be no doubt that the call was absolutely necessary, and is perfectly consistent with practice and principle. The same thing was done by the Lords Justices in *Gay's Case*; (a) the company there was not a perfectly registered company like the present, but the parties were in exactly the same predicament, because the only persons liable were persons who had agreed to take shares in specified proportions, and were all liable *inter se* just as if it had been a company completely registered. The question there was, whether it was right to raise the money required for paying costs from a limited out of a larger number of shareholders, the others being also liable; and it was held that the proper course would be to raise it from them all, the effect of which would have been to require a contribution of sixpence instead of a



shilling ; but it being shown that the other parties were insolvent, and that it would be absurd to try to get any thing from them, the Court held that the required fund must be raised from those who were liable and solvent. That proceeding might be doing an injustice, and inflicting upon them a hardship, but it was a thing which could not be helped ; and it must always happen in a partnership in which each and every person is liable to all the demands, that some one may have to advance more than his share, and must rely upon ultimately getting himself set right at the conclusion of the concern. I think therefore it is quite clear that the call in the present case was properly made, and that the amount was properly estimated. Even if the amount had been estimated at \* 474 too much, I should have hesitated as to interfering on \* that ground ; but that really was not the case, for, although more has been realized than was anticipated, it was a mere accident, and is a matter of no consequence.

Under these circumstances, an application was made to the Vice-Chancellor by Mr. Greenwood, one of the contributories who had paid his original deposit, to discharge the order for the call in question, and upon that application his Honor made the order now appealed against. By that order, &c. [his Lordship here read the order as above set out.] And we are of opinion that it was necessary for the purposes of winding up the company that the money should be raised, and as it is obviously incompetent for parties entering into a partnership to stipulate that they will not be liable for the costs of any proceedings that may be instituted against them for winding up the concern,—as it is absurd to say that they could thus oust the jurisdiction of the Court,—it would be sufficient for us to state, as a reason for not concurring with the Vice-Chancellor, that the order for the call was the only practicable method of raising the funds necessary for proceeding with the winding up of the company, treating it as a partnership for the winding up of the affairs of which there had been a decree in this Court. The grounds, however, on which the Vice-Chancellor proceeded, stated very clearly and fully in his judgment and supported in argument here, involve principles so extensive, so important, and so interesting to a commercial community, that we think it right to say, not merely that we do not concur in the order made by his Honor upon the narrow ground I have already stated, but that, with all deference to his Honor's judgment, we cannot go

along with him upon the construction he has put upon the statute, and his view of the \* rights of parties in joint-stock \* 475 companies arising out of it.

In the first place, the Vice-Chancellor has assumed that it was one of the terms of the deed of this company that the shareholders should not be liable for any thing beyond 1*l.* per share; and if our only difference from his Honor had been on the construction of the eighty-ninth clause to which he referred, it might not have been very material to advert to it, as it would have applied to this company only. I am bound, however, to say that I think that, whatever may be the meaning of the clause (and it is not easy to say what its precise meaning is), it could never be intended to nullify the other clauses in the deed conferring upon the directors powers necessary for the proper conduct of business, according to the general scope of dealing and object of the company; yet such would be the effect of the construction put upon it by the Vice-Chancellor.<sup>1</sup>

I will now proceed to state the grounds why, upon the main question of the liability of the shareholders, I cannot agree with the Vice-Chancellor. Supposing that the parties had really stipulated that, in no contingency and under no circumstances whatever, whether the affairs of the company prospered or failed, should any one of the shareholders be liable for more than 1*l.* per share, what would be the consequence of such a stipulation? His Honor's judgment proceeds upon the ground that no creditor could then come upon a shareholder beyond the 1*l.* per share. That is a very strong assumption, for it militates against the principle of partnership as hitherto understood in this country. Whether the principle is a right or wrong one is a matter now under investigation before the legislature, but that it is \* the principle cannot, \* 476 I think, for one moment be disputed, namely, that every person engaged in a partnership is liable solidarily, as they say upon the Continent, for every thing.<sup>2</sup> Thus A., B., and C., carrying on

<sup>1</sup> See 1 Lindley Partn. (Eng. ed. 1860) 200-203; *Ernest v. Nicholls*, 6 H. L. Cas. 419; *Balfour v. Ernest*, 5 C. B., N. S. 601; *Hambro v. Hull and London Fire Ins. Co.*, 3 H. & N. 789; *Prince of Wales, &c., Assurance Co. v. Harding*, Ell. Bl. & Ell. 183.

<sup>2</sup> See 1 Lindley Partn. (Eng. ed. 1860) 300, 301; *Boardman v. Gore*, 15 Mass. 339, 340; *Collyer Partn.* (5th Am. ed.) § 6; *In re Agriculturist Cattle Ins. Co.*, *Baird's Case*, L. R. 5 Ch. Ap. 733.

business together, may stipulate among themselves that no one of them shall be liable for more than 1000*l.*; yet, if in the conduct of their business they incur a debt to the extent of 10,000*l.*, every one of them would be liable for it, notwithstanding any stipulation they might have made with one another. That doctrine does not depend upon the persons dealing with the partners having notice, and any notice would be quite immaterial, for creditors would only know what engagements the partners had made between themselves, whereas the rights of creditors are wholly extrinsic of any such engagements. If the deed of partnership, containing such a provision as I have mentioned, were hung up in the shop, it would make no difference; for how could a person dealing with the firm tell whether each partner would be liable to him or not? They might have already incurred debts with other persons to the extent provided, and thus it would not be possible for him to ascertain the limit of their liability. Whether there ought to be such a limited liability is not now the question; the Court has only to enunciate what is the law, and that is, that such a notice would be of no avail at all.<sup>1</sup>

The law as to common partnerships being such as I have stated, what is the case of a joint-stock company? It might be rather a curious and interesting speculation to inquire in what manner exactly, and when, these partnerships became distinguished from

<sup>1</sup> See 1 Lindley Partn. (Eng. ed. 1860) 266-268, 301; Collyer Partn. (5th Am. ed.) §§ 387-389; Bromley v. Elliott, 38 N. H. 303; Monroe v. Conner, 15 Maine, 178; *In re Worcester Corn Exchange Co.*, *ante*, 180, and cases in note to this point; 2 Am. Lead. Cas. (4th ed.) 442; Leavitt v. Peck, 3 Conn. 124; Le Roy v. Johnson, 2 Peters, 186; Feigley v. Sponeberger, 5 Watts & S. 567; Forbes v. Marshall, 11 Exch. 166, 179, per MARTIN, B.; Gordon v. Sea Fire Life Assurance Society, 1 H. & N. 599; *In re Agriculturist Cattle Ins. Co.*, Baird's Case, 5 Ch. Ap. 783, Lord Justice JAMES said: "As between the partners and the outside world (whatever may be their private arrangements between themselves), each partner, in the case of an ordinary partnership, is the unlimited agent of every other in every matter connected with the partnership business, or which he represents as partnership business, and not being in its nature beyond the scope of the partnership. A partner who may not have a farthing of capital left may take moneys or assets of this partnership to the value of millions, may bind the partnership to contracts to any amount, may give the partnership acceptances for any amount, and may even — as has been shown in many painful instances in this Court — involve his innocent partners in unlimited amounts for frauds which he has craftily concealed from them."

ordinary partnerships, and by what steps they advanced to their present position. That long before the joint-stock Acts they were distinguished, is a proposition that cannot be controverted, although it may be difficult to say precisely \* in what points \* 477 they differed. They certainly differed in this, that whereas, according to the ordinary laws of partnership, any one partner acting within the scope of the partnership might bind all the other partners, it was not so with a joint-stock company; for, independently of the Joint-stock Companies Act, partnerships consisting of a number of persons too numerous to act in the way that an ordinary partnership does, had been in the habit of exercising many of their functions, accepting bills, giving orders for goods, &c., solely through the means of directors. I have never, however, heard it suggested that, independently of the Act, partners could absolve themselves from the ordinary liabilities of partnership *quoad* third parties because they were very numerous, though Lord ELDON frequently said that it would be extremely difficult to enforce the rights of third parties against bodies so numerous, and he therefore, I believe, doubted whether they were not illegal. But it is idle to speculate upon that point; for these companies, being consonant with the wants of a growing and wealthy community, have forced their way into existence, whether fostered by the law or opposed to it; they have not, however, proceeded to the extent of enabling their members to enter into arrangements absolving themselves from liabilities without the circle of their own deed, that is, from liabilities to third persons.<sup>1</sup>

So stands the matter independently of the Act of Parliament, and it therefore becomes necessary to see what alteration has been effected by it. The Act had its origin in the numerous schemes, either actually bubble schemes or very similar to them, which were started, and into which the unwary were entrapped; and the legislature, with the view of providing some security against the impositions which were being practised, declared \* that \* 478 it should not be lawful for any persons to engage in forming

<sup>1</sup> See Robinson's Executor's Case, 6 De G., M. & G. 572. *In re Agriculturist Cattle Ins. Co.*, Baird's Case, L. R. 5 Ch. Ap. 733, Lord Justice JAMES said: "Ordinary partnerships are essentially in kind, and not merely in the magnitude of the partnership or the number of the partners, different from joint-stock companies;" and he thereupon proceeded to notice and comment upon the points of difference, pp. 733-735.

themselves into a company, or to receive subscriptions, without at once registering themselves, so as to give public notice of the object they were engaged in. They might then receive subscriptions, and, after complying with certain requisites, proceed to complete registration, and prosecute their scheme under the sanction of the law. Among the things thus required was, the execution of a deed showing the terms of partnership, and, this being done, the company became incorporated from the date of the certificate of complete registration by the name of the company for the purpose of carrying on business in that name; and the Act provides (sect. 25) "that such company shall continue so incorporated until it shall be dissolved, and all its affairs wound up; but so as not in anywise to restrict the liability of any of the shareholders of the company, under any judgment, decree, or order for the payment of money which shall be obtained against such company, or any of the members thereof, in any action or suit prosecuted by or against such company in any Court of Law or Equity." Thus, while the name of an incorporated company is given to the undertaking, one of the essential incidents of a corporation is taken away, or rather is not conferred, for although the individual members no longer trade separately, yet this section enacts they are to be liable nearly as they were before. The sixty-sixth section provides, that every judgment and decree obtained against the company shall take effect and be enforced, not only against the property of the company, but also against the person, property, and effects of any shareholder, until such judgment or decree is fully satisfied, except that, in the case of a former shareholder, no execution shall be issued on such judgment or decree after the expiration of three years next after he shall

\* 479 have ceased to be a shareholder of the \* company. Thus it is clear that the liability to creditors is not materially affected, and the legislature has not only not exempted the shareholders from their ordinary obligations as partners, but has expressly enacted that they shall remain liable, subject only to the limitation as to three years in a particular case, which is not now in question.

Such being the state of the law, it remains to consider whether there are any authorities leading to the opinion expressed by the Vice-Chancellor, and from which I find myself, with all possible respect, compelled to dissent. His Honor appears to have relied

upon two or three cases which, when looked at, do not appear to me to influence the case at all.

One of them, *Ridley v. The Plymouth Grinding and Baking Company*, (a) was before the Court of Exchequer in 1848, when I had the honour of a seat there, though I do not think I was a party to the judgment. Whether I entirely concur in all the language uttered by or attributed to the very learned Judge by whom the judgment was delivered I am not prepared to say; but the decision appears to me to be perfectly correct. The circumstances of the case were of this kind: The Plymouth Baking Company was a joints-stock company, incorporated under the Act of Parliament; they held a certain house as tenants to a gentleman of the name of Bickford; the directors took upon themselves to underlet a portion of the premises, and so doing the law would of course imply an obligation on their part to indemnify their undertenant against all claim for rent at the instance of the head landlord: it seems, however, that they did not \* pay \* 480 their rent to Bickford, and he, being an entire stranger to the underlease, with which he had no concern, distrained upon the undertenant, Ridley, who thereupon brought his action against the company to indemnify him, and the question was whether the company were liable to indemnify him or not. It must here be observed that the leasing of the property was no part of the ordinary business of the company; it might or might not be a prudent thing to do, but before the company could be sued by a person under a contract to indemnify against rent which he had been called upon to pay, he would have to show that either the company had entered into a contract to indemnify him, or that somebody authorized by the company had done so. It certainly was no part of the ordinary business of the company to enter into such contracts.<sup>1</sup> The company could be charged only by showing that they had given a special authority to the partners to engage to indemnify, and to ascertain this, it would be necessary to see the terms of the company's deed of settlement. This was the ground upon which the Court of Exchequer proceeded; they looked at the terms of the deed, and, finding no such authority given, they held, upon perfectly unanswerable grounds, that the company was

(a) 2 Exch. 711.

<sup>1</sup> See Collyer Partn. (5th Am. ed.) §§ 417-421, and cases in notes; 1 Lindley Partn. (Eng. ed. 1860) 224.

not liable to indemnify the plaintiff. The company had not themselves entered into any contract, and they had not given any authority to the directors to do so: it was upon that ground that the Court acted.

The next case, that of the Kingsbridge Flour Mill Company against the same Baking Company, (a) is unfortunately very shortly reported; but it does not seem to stand necessarily upon the same ground, though it appears to have been so treated, \* 481 and therefore not to \* have been fully argued. I doubt whether it ought to have been treated as necessarily following the fate of the preceding case, for if the flour purchased had been used for their baking it would have been a transaction in the course of the partnership business; but the purpose for which the flour was used does not distinctly appear, and this, on the authority of the subsequent case in the Common Pleas, may make an important difference.<sup>1</sup>

The case of *Smith v. The Hull Glass Company*, (b) to which I refer, was the case of a company incorporated just in the same way as the baking company; they purchased goods in the course of their trade, and eventually it was held that all that was required by the deed had in truth been done in reference to the transaction, that the order was given by all the directors or adopted, if not authorized in terms, by them all. Mr. Justice MAULE, in his judgment, states very clearly what the law is, and he says, "Any person looking at this deed would see that the directors of this company were authorized to carry on the business of manufacturing glass." For such a purpose persons dealing with a company are bound to look at the deed, unless there is something, independently of the deed, which shows that the trade they are carrying on is the one they are authorized to carry on.<sup>2</sup> If, for instance, being authorized to carry on the business of manufacturing glass, the company had taken on themselves to manufacture steel, it would possibly be an answer to any person who supplied them with goods for that purpose to say, that if he had looked at the deed he would

have seen that this was not the business that was to be \* 482 carried \* on. In the *Hull Glass Company's Case* the board

(a) 2 Exch. 718.

(b) 11 C. B. 897; see p. 927.

<sup>1</sup> See Collyer Partn. (5th Am. ed.) § 389; *Monroe v. Conner*, 15 Maine, 178.

<sup>2</sup> See cases in note (1), *ante*, p. 475.

of directors had power to appoint a manager, and to ascertain that, it might be necessary that parties dealing with them should look at the deed; but, there being that power, the Court of Common Pleas considered that those who dealt with the directors as glass manufacturers, knowing that the company was formed with directors to carry on the business of glass dealing, had a right to suppose that the directors carried on business in the ordinary way, and thus the directors would be made liable.

These three are the only decisions that bear upon the case. Other cases were referred to, *Hallett v. Dowdall* (a) and *Lord Talbot's Case*; (b) but they went upon a totally different principle, depending, not upon any contract which the members of the company had made *inter se*, but upon the terms of the contract entered into between the company and the creditor. That is quite a different question. In the present instance, it may be that creditors would have no claim against the company, if all the policies had been entered into upon the terms that nothing was to be made liable to the party claiming upon the policy but the one pound per share which each member was to contribute, nothing but the capital of the company, whatever that means: some of the cases have so stated the law. If the terms of the contract between the insuring party or the dealing party and the company are that nothing shall be liable but a particular fund, then no principle arising from the nature of joint-stock companies or from the Joint-stock Companies Act is wanted to show that the individual members would not be liable. That \* is not by \* 483 reason of any contract that the body of individuals have made with each other, but by reason of the very contract made with the creditor. The cases which were pressed in the argument by the respondent were of this kind, and they evidently have no bearing upon the present discussion. One of the policies was handed up to us, to show that the form used was such as I have alluded to. I did not examine it, but if the policy was so worded the individual members of the company may not be personally liable under it; but this will be because by the terms of the contract they have not made themselves personally liable, and that is a principle equally applicable to a joint-stock company, or an ordinary partnership, or a single individual. If I say to a man,

(a) 21 Law J., Q. B. 98.

(b) 5 De G. &amp; S. 386.



"I will insure you against all losses either by fire or sea, provided always that my estate of Blackacre only shall be liable to make good to you the loss," he would have no right to say that I am bound personally to pay. My answer would be, "Personal liability is beyond my contract, *non hæc in fœdera veni*: I agreed with you to such an extent, but no further."<sup>1</sup>

I have deemed it right to state what I have done, because the judgment of his Honor, proceeding upon a ground which I conceive to be not sustainable, it might be supposed, if it were to pass unnoticed, that it had received the sanction of this Court. To exclude such a notion, I have thought myself bound to state that I cannot concur in the view which has been propounded by his Honor. It is sufficient for the purpose of the present appeal to go upon the narrow ground I first adverted to; but even if that narrow ground had failed, and if this had been a call to raise money to pay creditors, it could not have been held that by the joint operation of the Act of Parliament, and the clauses in

\* 484 \* this deed, the creditors had lost their right to go against the shareholders.

The result, then, is, that the order of the Vice-Chancellor must be discharged, and the original order of the Master for a call will stand. The official manager must, I think, have his costs of both hearings out of the fund, and all the other parties, who were served and appeared here in consequence of the extension of his Honor's order beyond what Mr. Greenwood asked, must also have their costs. With regard to Mr. Greenwood himself, the strict justice would seem to be, that he should pay so much of the costs of the first hearing as led to the order so far as related to himself, and that he should not pay so much of the costs as led to the extension of the order; but as the apportionment of these costs would be attended with much difficulty and expense, it is my opinion, and I believe it is also the opinion of my learned brothers, that the proper course will be to direct that Mr. Greenwood shall neither pay nor receive costs.

THE LORD JUSTICE KNIGHT BRUCE.—This case is not one of mere appeal, inasmuch as there is evidence before us that was not before the Vice-Chancellor,—evidence which the judgment de-

<sup>1</sup> See Collyer Partn. (5th Am. ed.) § 486; Lindley Partn. (Eng. ed. 1860) 302 *et seq.*

livered by his Honor induces me to think that he would have considered not irrelevant nor useless. The order complained of was made in January last, upon a motion, and only upon a motion, made by Mr. Greenwood on his own behalf solely; a motion in these terms: "Take notice that this Court will be moved before the Vice-Chancellor, by way of appeal on the 10th of November, by counsel, for William Greenwood, of Halifax, land-surveyor, that the order of the Master to whom this matter stands referred, bearing date the 20th of June, 1853, whereby he peremptorily ordered that a call of \*one pound per share should be made \*485 on the said William Greenwood as a contributory of the said company, may be discharged."

The call so described was thus: In the Master's book of that 20th of June there are these entries together: "Master's Office, Southampton Buildings, 20th of June, 1853.— In the matter of the Joint-stock Companies Winding-up Acts, 1848 and 1849, and of the Sea, Fire, Life Assurance Society. Memorandum. I was this day attended by the counsel and solicitor of the official manager and by the official manager, and by the counsel and solicitors for several contributories, on an application for a call of four pounds per share, for payment of debts and for costs. *Mr. Roxburgh*, for the official manager, read an affidavit of the official manager, sworn 28th of April, 1853, on the file. The official manager was sworn, and examined and cross-examined by counsel for several contributories. A short-hand writer was employed. Counsel for the official manager was heard in support of the call, and counsel for several contributories were heard in opposition thereto. Considering that the consideration of the debt of Mr. Chapple was not sufficiently before me to judge whether all the contributories ought to be charged with it ratably, I declined making a call for debts. I order a call of one pound per share for costs, to be payable on the 14th of July, 1853, the official manager to put on the file, within a fortnight, a statement on oath of the amount likely to be produced by that call; also his solicitors' bill of costs, and a statement on oath of his own expenses and disbursements up to the present time. I thought the official manager properly employed.— W. H. TINNEY." And then upon the next sheet, "Master's Office, Southampton Buildings, 20th day of June, 1853.— In the matter of the \*Joint-stock \*486 Companies Winding-up Acts, 1848 and 1849, and of the

Sea, Fire, Life Assurance Society, I, W. Henry Tinney, the Master of the High Court of Chancery charged with the winding up of this company, do peremptorily order that a call of one pound per share be made on the contributories of the company whose names are included in the list of contributories, so far as the same has been at present settled by me. And I peremptorily order each contributory on the 14th day of July, at twelve o'clock at noon, at No. 99, Cheapside, in the City of London, to pay the amount of such call to Henry Ernest, the official manager of this company. — W. H. TINNEY."

The last part of the proceedings of the 20th of June that I have read is what alone is ordinarily termed a call; but I think that, for no effectual, no useful purpose, ought one part of the proceedings to be regarded without the rest. This was the order upon the motion.

[His Lordship then read the order of the Vice-Chancellor.]

Having had to reflect and having carefully reflected on what in this state of things might be best to be done, I have formed, upon the whole mass of materials before us, the opinion that the fittest course to be taken will be to discharge the order and substitute for it a mere refusal of the motion before the Vice-Chancellor without costs, and but one declaration, namely, a declaration that the official manager, and, as to the appeal motion, all (if any) other persons served with notice of the appeal motion, except Mr. Greenwood, ought to have the costs of both motions out of the estate, which is the Lord Chancellor's conclusion,—a conclusion

\*487 that, perhaps, \*may be well reached by various ways. It is sufficient, I think, for me to state my persuasion to be, as it is, that in the present instance Mr. Greenwood was at the making of the call, and still is, a contributory within the meaning of that term, as used in the statute on this subject; that the call was made for a legitimate and reasonable purpose; that its amount was not and is not too large for that purpose; and that (though it may perhaps seem to affect equally those who ought to be affected by it unequally) it has caused and will cause no injustice substantially. I wish to be understood as not intending to express or intimate either dissent from any thing that the Lord Chancellor has laid down, or an opinion that the evidence added upon the

appeal motion to the original materials is essential to the support of our present order.

**THE LORD JUSTICE TURNER.** — This case involves the consideration of two distinct points: first, whether, without reference to the question of limited liability, this call was properly made upon Mr. Greenwood; and secondly, whether, to adopt the terms of the order, the creditors of the company have established against the contributories of the company any liability for payment of the debts beyond the amount of capital paid or payable by each shareholder, according to the deed of settlement of the company.

As to the first point, whether, setting aside the question of limited liability, this call was properly made upon Mr. Greenwood, it is unfortunate that the true state of the affairs of this company does not appear to have been presented to the Vice-Chancellor. The affidavit of the official manager shows that great expenses had been incurred beyond what the available assets of the company were adequate to meet. It was reasonable, \*therefore, \* 488 that a call should be made, and Mr. Greenwood being liable for these expenses as a member of the company, it was proper the call should be made upon him.

As to the second point, — whether the creditors of the company have established a liability against the contributories beyond the amount of the capital paid or payable by each of them, — this question seems to me also to involve two considerations: first, whether, according to the provisions of the Joint-stock Companies Registration Act, the liability of the shareholders to creditors is limited by the provisions of the deed which the shareholders may have executed; and secondly, whether the deed which the shareholders have executed in the present case limits their liability to the amount of their subscriptions. It was said that this deed limits the liability of the shareholders to the amount of their subscriptions, because, by the 89th section of the deed, it is provided that the capital of the company shall be the amount prescribed by the deed, and that the shareholders shall not be called on to contribute a further amount of capital; but this deed must be construed not according to this single provision, but according to all its provisions, and to construe the 89th section as restricting the liability of the shareholders to the creditors of the company would, in my opinion, be contrary to the whole spirit and context of the

deed; for, by clause 31 of this deed, powers are given to the directors of this company to purchase on such terms and conditions as may be lawfully imposed the business of any other fire, life, or marine insurance company, and for that purpose to enter into contracts and agreements in the name of the Sea, Fire, and Life Assurance Society, powers which have been in fact exercised,

for, after the formation of this company a deed was entered  
 \* 489 into by which \* the directors contracted for the purchase of the business of the Port of London Insurance Company, and part of the debts proved before the Master in this case consists of debts of the Port of London Insurance Company, for which this company became liable under that purchase, thus authorized by the provisions of the deed. But the case does not rest there, for in addition to the clause to which the Lord Chancellor has referred, by which powers are given to borrow to the extent of a million, the 45th section of this deed says: "It shall not be lawful for the directors to borrow any sum of money on behalf of the company except under the 22d clause of these presents, and that in contracting debts and liabilities on behalf of the company, the directors shall not exceed the usual periods of credit according to the customs of the several trades or businesses with which the directors shall from time to time deal, contract with, or be engaged in;" thus importing that the directors were to have the power on behalf of the company to contract debts and liabilities, provided that in contracting those debts and liabilities they did not exceed the usual periods of credit according to the custom of the trade in which they were dealing. The shareholders of this company who have executed the deed, have thus both expressly and impliedly authorized the directors of this company to contract debts on the company's behalf, and I cannot think that it would be a sound construction of this deed to hold that the mere stipulation contained in it, that no further capital shall be called for from the subscribers to the deed, is of sufficient force to defeat the authority thus expressly and impliedly given. This being my view of the construction of the deed, it does not appear to me that the ulterior question upon the effect of the Act of Parliament arises in this case, for by the 25th section of the Act the company, upon a complete registration, became incorporated for the  
 \* 490 purpose of carrying on the \* business according to the provisions of the Act and of the deed; and if the directors

were empowered to contract debts on the part of the company, I see no ground for saying that the business has been carried on otherwise than according to those provisions. So much, however, has been said, in the course of the argument before us, upon the effect of the Act of Parliament, that it may be right, perhaps to make some few observations on that subject.

The effect of this Act of Parliament, as I understand it, is this: if there be a judgment recovered against the company, the shareholders of the company are liable upon that judgment. This is the clear import of the 25th section of the Act; and the 66th, 67th, and 68th sections of the Act contain provisions as to the mode of enforcing against the shareholders the judgments obtained against the company. It is said, however, that as these companies are incorporated for the purpose of carrying on business only according to the provisions of the Act, and, to adopt the language of the Act, of such deed as aforesaid — that is, the company's deed — no judgment can be recovered against the companies where there are clauses restricting the liability of the shareholders — but there is nothing in the Act of Parliament which prevents judgment being recovered against the companies, and according to the provisions of the Act, where judgment is recovered against the companies, the judgment is made available against the shareholders. The incorporation, according to the provisions of the Act, does not therefore affect the rights of the creditors of the companies. Are, then, the rights of the creditors affected by the companies being incorporated for the purpose of carrying on business according to the provisions of the deed? To determine this point, we must consider how the case stands independently of the provisions \* of the Act. Independently of the \* 491 Act, these deeds are no more than ordinary partnership deeds, — deeds executed by the shareholders of the companies, operating *inter se*, but not operating so as to affect the rights of third persons against the companies. Does, then, the Act of Parliament alter the operation of these deeds, and give them an operation against the rights of third persons which they would not have independently of the Act?

I think that this is not the true meaning of the Act; and I think so for this reason. The other provisions of the Act show that it was not so intended; the 13th section of the Act, with reference to the out-going shareholders of the company, recognizes

their antecedent liability for the debts and engagements of the company, and provides for its continuance until the transfers made by them are returned.

And, again, the 44th section, as to contracts, provides that they shall be entered into by the directors in a particular mode, which is specified; and "that in the absence of the specified requisites, or any of them, they shall be void and ineffectual except as against the company on whose behalf they shall have been made." So that contracts, although wanting in the prescribed requisites, were to be valid against the company, and the contracts being thus made valid, there might be judgments against the company upon them; and there being such judgments, it is difficult to suppose that the legislature, by the provision that the contracts should be void except against the company, could have intended that the judgments should not be enforced against the shareholders under the ulterior provision of the Act; but at all events the section shows that contracts entered into with the prescribed for-

\* 492 malities were binding upon the \* company, and by consequence upon the individual shareholders.

It seems to me therefore that, notwithstanding the provisions of this Act and this company's deed, the liability of shareholders remains unrestricted. There may be debts contracted and engagements entered into by the directors of these companies which are wholly beyond their authority, and by which therefore the shareholders may not be bound; but I do not think that the shareholders of these companies can exonerate themselves from the claims of creditors merely by provisions purporting to restrict their liability. My opinion, therefore, coincides with that of my learned brother and the Lord Chancellor, that this order must be discharged.

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\* 493 \* *Ex parte* JAMES JAMES and JAMES CUSHION.

In the Matter of JOSEPH TRATT.

1853. January 14, 19.. Before the LORDS JUSTICES.

A trader was entitled to leaseholds charged with an annuity in favour of an insurance company. The company, being desirous of befriending him, con-

sented to sell him the annuity at less than its full value, but he, being at the time in embarrassed circumstances, and having committed an act of bankruptcy, nominated another person as the purchaser upon the same terms. The trader was afterwards declared a bankrupt. Upon a bill being filed by the assignees against the purchaser claiming the benefit of the purchase, the purchaser insisted that he was entitled to it; but the Court made a decree against him, with costs, which he paid. All the debts having been paid under the bankruptcy, and there being a surplus, which the bankrupt had aliened: *Held*, that the purchaser of the annuity was not entitled to be repaid his costs out of the surplus, being either a trustee who had improperly claimed to be entitled beneficially, or a party to a combination to withhold the property of a failing person from his creditors, in the latter of which cases it would be against public policy to allow him to recover the costs from the alienee of his associate *in pari delicto*.

*Held*, also, that a deposition of the bankrupt, that there was no arrangement between him and the purchaser, did not conclude the alienee of the surplus, the bankrupt having been at the time of the examination under the influence of the purchaser.

In this case there was a surplus of the bankrupt's estate amounting to 596*l.* 18*s.* 4*d.*, after payment of all his debts in full, and this was the petition of alienees of the surplus to whom the bankrupt had assigned it, appealing from the decision of Mr. Commissioner EVANS, refusing to direct payment of the surplus to the appellants by reason of a claim made by Mr. Cafe, one of the respondents, for the payment of certain costs incurred by him in a suit in Chancery of *Baskett v. Cafe*, reported in the fourth volume of Messrs. De Gex & Smale's Reports. The facts of that case are there fully stated, but the following summary of them is sufficient for the purposes of this report.

In 1838 the bankrupt, who carried on the business of a plumber and glazier, was possessed of leasehold houses charged with the payment of an annuity to the Globe Insurance Company, which was in arrear to the amount of 499*l.* On the 6th of February, 1838, he sent a \* memorial to the Globe Insurance \* 494 Company, referring to the reverses of fortune which he had met with, and proposing to pay to the company 900*l.* on their releasing the property from the annuities. This was below the full value of the annuity; but the directors of the Globe Office, after stating their willingness to make a sacrifice under the circumstances, entered into negotiations with the bankrupt, the result of which was that the respondent, Mr. Cafe, on the 8th of Novem-



ber, 1838, became the purchaser from the company of the annuity and arrears at the price named.

On the 13th of November, 1838, the bankrupt filed a declaration of insolvency, and on the same day a creditor named Jonathan issued the fiat against him, on which, on the 21st of November, 1838, the adjudication took place, founded, not on the declaration of insolvency, but on an act of bankruptcy committed in July, 1838; and, on the 5th of December, Mr. Jonathan was appointed creditors' assignee.

On the 27th of December, 1838, the leaseholds, subject to the annuity, were put up to auction by the assignees under the bankruptcy, and were purchased by Mr. Cafe for 120*l*.

It appeared that Mr. Cafe had, after the bankruptcy, supported the bankrupt by paying him monthly or weekly allowances.

On the 16th of January, 1839, the bankrupt, in an examination under the bankruptcy, denied that when Mr. Cafe had purchased the annuity there was any agreement between them that the bankrupt was to have any benefit from the purchase.

\* 495     \* In the same year Mr. Jonathan, the creditors' assignee, died. Another, who was appointed in his place, died in 1843, whereupon Mr. Cafe was appointed creditors' assignee.

In January, 1839, the bankrupt obtained his certificate, and on the 4th of June, 1845, he assigned, for valuable consideration, to James James, one of the appellants, all his estate, real and personal, in trust for the bankrupt for life, and after the bankrupt's death in trust for James Cushion, the other appellant.

In 1847 the bankrupt died.

In December, 1847, certain creditors presented a petition under the bankruptcy to the Vice-Chancellor, seeking to impeach the above-mentioned purchases of Mr. Cafe, and to have him removed from being assignee. Under the order made upon that petition, on the 1st of February, 1848, liberty was given to three creditors to institute, in the character of assignees, a suit in Chancery against Mr. Cafe, to set aside the purchases made by him as above mentioned. The petition was in other respects ordered to stand over.

In pursuance of this order the three creditors, on the 27th of March, 1848, filed a bill in Chancery against Mr. Cafe, praying that he might be declared a trustee of the annuity and the arrears thereof for the plaintiffs as assignees, subject to such lien as he might have in respect of the purchase-money paid by him, and that

the purchase of the leaseholds, subject to the charge, might be declared fraudulent and void, and might be set aside upon repayment of the purchase-money and interest.

Mr. Cafe by his answer denied that there was any \*agree- \* 496 ment that he should be the purchaser of the annuity for Tratt's benefit, and he insisted that he was himself entitled to the whole benefit of the purchase.

On the 25th of July, 1851, a decree was made in the suit setting aside the purchases with costs.

The petition for the removal of Mr. Cafe was again brought on before the Vice-Chancellor on the 2d of August, 1851, when an order was made discharging Mr. Cafe from being assignee, and directing the commissioner to cause a sitting to be held under the fiat for a new choice. And it was further ordered that Mr. Cafe should account for the estate and effects of the bankrupt (if any) come to his hands, and should pay and deliver over to the official assignee such parts (if any) of the estate and effects of the bankrupt as, upon taking of the account, should appear to have come to his hands, and should pay to such of the petitioners as were living their costs of and occasioned by the petition, so far as they had been increased by any evidence on Mr. Cafe's behalf in support of his title to the leasehold messuages and premises in the petition and former order mentioned. And it was declared that that order and the decree in the suit, so far as they directed the payment of any costs, were to be without prejudice to any question between Mr. Cafe and the bankrupt or his representatives. And it was ordered that no part of the surplus estate of the bankrupt should be paid to the bankrupt, or his representatives or assigns, without previous notice to Mr. Cafe.

By another order in the bankruptcy, dated the 1st of May, 1852, Mr. Cafe was ordered to pay to the official assignee 15*l.* 14*s.* 9*d.*, the amount found due by the decree, and the costs were directed to be taxed from the last taxation, and Mr. Cafe was ordered to pay the same. \* And it was ordered, that thereupon all \* 497 further proceedings in the cause should be stayed.

The assignees realized assets more than sufficient to pay all the creditors in full, and after such payment the assignees had in their hands a surplus of 596*l.* 15*s.* 4*d.*

The appellants presented a petition to the senior commissioner praying that the surplus might be paid to them, and in pursuance

of the order of August 2, 1851, gave notice to Mr. Cafe, who opposed the petition, and contended that under the reservation in the order of 1850 he was entitled, as against the bankrupt and those claiming under him, to be repaid the costs which he had incurred in the suit in Chancery. The commissioner refused to make any order upon the petition. From this refusal the present petition of appeal was presented by Mr. James and Mr. Cushion.

*Mr. Russell* and *Mr. Cooke*, in support of the appeal. — The Court of Chancery decided that the understanding between the bankrupt and Mr. Cafe was entered into to defeat the creditors. They were *in pari delicto*, and therefore neither of them can claim costs against the other.

*Mr. Bacon*, *Mr. Piggott*, and *Mr. Hardy* appeared for Mr. Cafe.

*Mr. Bury*, for the assignee. — *M'Neill v. Cahill* (a) was cited.

The Lord Justice KNIGHT BRUCE referred to *Reynell v. Sprye*. (b)

\* 498     \* THE LORD JUSTICE KNIGHT BRUCE. — This purchase (I am now speaking of the annuity) must, upon the evidence, have been made by Mr. Cafe, I think, in one of two ways, either as a trustee for Mr. Tratt, in which event there is no question but that the present controversy must be decided in favour of the present petitioners; or, if he did not purchase as trustee for Mr. Tratt in the ordinary sense in which I have been using the expression, the purchase must be taken to have been the result of a combination, from whatever motive, friendly or otherwise, between Mr. Cafe and Mr. Tratt, to withhold certain property, for the benefit of one or the other, or both of them, from the creditors of Tratt, a failing and fallen man in worldly circumstances. Now, in such a state of things, as far as the title to the property is concerned, the public interest requires that the purchase should be considered as a matter of trust, that, without regard to the merits of either of the individuals, a man so acquiring property should not be heard to say that he has a title to it.

If, as has been contended, fault and improper intention existed

(a) 2 Bli. N. S. 316.

(b) 1 De G., M. & G. 660.

on each side, is the condition of the possessor in this case the better for that? I am of opinion that it is not; for not only was the disparity of circumstances such as to create a gross inequality, and to prevent Tratt from having any voice in the matter, but there are also considerations rendering society deeply interested in obviating the possibility of gain arising to a man by such a transaction. The property must be considered as having remained in Tratt, as far as mere title is concerned.

It has been suggested, and fairly and well argued, that the costs of the suits, as between Cafe and Tratt, ought to be borne rather by Tratt than by Cafe; that, \* however, is not my \* 499 opinion. The defence to the suit for setting aside the purchase was not put by Mr. Cafe on grounds which the Court could require Mr. Tratt to recognize, or on grounds on which this Court can allow Mr. Cafe to obtain total or partial indemnity. These costs must remain where the law has thrown them.

With respect to the account between Mr. Tratt and Mr. Cafe, that has to a great extent been already taken; but there are some allowances to be made which could not have been made as between the creditors and Mr. Cafe. There must be some provision for these, and we shall be glad to receive suggestions as to the mode.

THE LORD JUSTICE TURNER. —This is an application by persons who for present purposes must be assumed to represent the bankrupt, claiming the surplus of the bankrupt's estate. *Prima facie* that surplus belongs to the bankrupt, or those who represent him. It is attempted to be intercepted by a claim of Mr. Cafe, and the claim is put thus: A suit was instituted against Mr. Cafe by creditors in the characters of assignees, for the purpose of recovering part of the bankrupt's property, and he was ordered to pay the costs of the plaintiffs and his own, by the decree then made, which was followed by an order in bankruptcy of the 2d of August, 1851, declaring that the direction in the decree as to costs was to be without prejudice to any question between Cafe and Tratt or Tratt's representatives, and pointing therefore to the possibility of a surplus.

Now the true view of the case is this: Supposing the property had not been sold under the bankruptcy, but that from other funds coming to the bankrupt's estate all the debts under the

\* 500 bankruptcy had been paid, to \* whom would the equitable right to this property remaining vested in the assignees belong? Who would have had the better title to call for an assignment of the legal estate from the assignees, Cafe or Tratt? In examining that question it is to be considered what were the circumstances under which Mr. Cafe became purchaser of the equity of redemption, and of the annuity from the Globe. Now it is clear that a relation of a confidential kind existed between Tratt and Cafe, before October, 1830; and it is the common case on both sides that the transaction with the Globe was intended to be beneficial to those who were entitled to the property subject to the charge. It is, moreover, not disputed that the intention of the Globe Insurance Company was to confer a benefit on Tratt. It is equally clear that Tratt was at this period in a position of great difficulty, and it is not suggested that any person distinct from Cafe was acting on the part of Tratt. Looking at the transaction in that way, can it be doubted that, as between Tratt and Cafe, the former would have had an equity to set aside the transaction and to treat Cafe as a trustee for him of the purchase from the Globe?

It was said that Tratt was examined under the commission, and denied the existence of any bargain or arrangement between him and Cafe, that Cafe was to be a trustee for him; and it is contended that in the face of that examination, and a subsequent examination of Cafe in the presence of Tratt, it is incompetent for those who claim under Tratt to set up a case of trusteeship. But it must be seen what was the situation of Tratt at the time when he gave this evidence. He was at that time in a state of dependency upon Cafe, and was receiving from him small weekly and monthly payments of 10*l.* or even 1*l.* It is clear, therefore, that

at the period when this representation was made by Tratt  
\* 501 he \* was under the influence of Cafe, and that no statement made by him at that period could, consistently with the principles laid down by Lord ELDON in *Walker v. Symonds*, (a) have bound him so as to preclude his equity to set aside the transaction and treat Cafe as a trustee for him.

It is further said that the Court would not have given costs as against Cafe, if a bill had been filed against him by Tratt. But

(a) 3 Swanst. 1.

what was the defence made by Cafe in the suit which was instituted against him, and what would have been his defence to a suit instituted against him by Tratt? It is clear that, in the actual suit which was instituted against him by the assignees of Tratt, Cafe claimed the benefit of the purchase for his own benefit, independently of Tratt. It is equally clear that the same view would have been taken by Cafe, if the suit had been instituted against him by Tratt. That perhaps does not appear from his answer; but it appears that, from the year 1840 to the year 1848, when the suit was instituted by the assignees, Cafe had taken upon himself to treat the property as his own, and had ceased to make any allowance to Tratt. There was no recognition by Cafe of any title on the part of Tratt; Cafe claimed the benefit of the purchase for himself, and did not admit that he was a trustee. Now, if Cafe had filed an answer claiming to be beneficially interested, the Court would have made a decree against him with costs. I think, therefore, that there is no ground for the claim of costs set up by Mr. Cafe.

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\* *Ex parte* EDWARD SOLE MANICO.

\* 502

In the Matter of EDWARD SOLE MANICO, a Bankrupt.

1853. January 26. Before the LORDS JUSTICES.

A bankrupt had, when a very young man, commenced without capital a business to which he had not been brought up, and there was reason to believe that these circumstances were known to creditors who trusted him. He, on some occasions, bought goods and pledged them shortly afterwards; but it did not appear that he had bought the goods with the view of pledging them, nor did it appear that he had been guilty of untruth, or of ostentation, or selfish or extravagant expenditure. On the other hand, his accounts were regularly kept. *Held*, that the justice of the case would be satisfied by making his certificate of the third class, and suspending it for two years, and withholding protection for six months.<sup>1</sup>

The 256th section, which deals with "offences," is to be strictly rather than loosely construed; and *semble*, that if only one of the offences therein enumerated is committed, it is not imperative on the Court to award the extreme penalty there imposed.

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<sup>1</sup> See *Ex parte* Holthouse, 1 De G., M. & G. 237, and cases in note (2);

THIS was the appeal of a bankrupt from the decision of Mr. Commissioner EVANS, refusing the appellant a certificate or protection.

It appeared that in 1846 the bankrupt, who had not been brought up to any business and was then twenty-three years old, commenced that of a retail wine-merchant. He had no capital except 1000*l.*, which he had borrowed. Affidavits were filed in opposition to the petition, stating that the bankrupt had, after carrying on this retail business from January, 1846, to August, 1849, disposed of it and the stock and implements of trade to a Mr. W. R. Carter for 290*l.* 17*s.* 9*d.*, secured by three bills of exchange. That the bankrupt thereupon commenced business as a wholesale wine-merchant; that during the twelve months next preceding his bankruptcy he had borrowed various sums to the amount of 6043*l.* 8*s.* 8*d.*, by pledging goods; and that, previously to the 9th June, 1851, he had been in the habit of obtaining advances upon the deposit of wines purchased by him to a considerable amount; that,

between the 30th July, 1851, and the 24th May, 1852, he \* 503 had lost (on about \* fifty-five transactions) 5303*l.* 0*s.* 1*d.*;

that, as far as could be discovered, most of the goods upon which these losses arose were purchased by the bankrupt upon credit, and were pledged by him on or subsequently to his obtaining advances thereon; that, at the time of the bankruptcy, goods purchased for 1808*l.* 14*s.* 4*d.* were deposited with a Mr. Norris for advances to the amount of 680*l.* 10*s.*, and being afterwards sold by public auction realized little more than the advances; that, at the hearing of the bankrupt's application for the certificate before the commissioner, it was stated and not denied by the bankrupt that he frequently pledged the warrants, for wine purchased by him on credit, immediately after he had received them.

The bankrupt, in reply, deposed that his conduct had not arisen from fraudulent or dishonest motives, and that he did not know when he pledged the wines or spirits which he had purchased upon credit that he should be unable to redeem them, but hoped to be enabled to retrieve his position and pay for the goods; that the earlier sales of wines by auction were not occasioned by his inability to redeem them. He admitted, however, that some wine was subsequently sacrificed at public sale by the brokers, in consequence

*Ex parte* Nicholson, *In re* Nicholson, 1 De G., F. & J. 270; *Ex parte* Coleman, 3 De G. & J. 43; *Ex parte* Hammond, 6 De G., M. & G. 699.

of his being unable to redeem it; and he believed that most of his creditors were well aware of the same, and that the circumstance was frequently mentioned in conversation between his creditors and himself; and he deposed that he had not had the slightest difficulty in purchasing wine to any extent, but was continually pressed by persons in the trade to purchase large quantities of wine upon credit.

*Mr. Bacon* and *Mr. Baggallay*, in support of the appeal, contended that, although the conduct of the bankrupt was highly blamable, he had committed no \* offence within the \* 504 meaning of the 256th section of the Bankrupt Law Consolidation Act; and that, considering his youth and the reckless way in which he had been trusted, a less severe sentence than that which had been pronounced would satisfy the justice of the case.

The Lord Justice KNIGHT BRUCE referred to *Ex parte Martyn*. (a)

*Mr. Swanston* and *Mr. Bagley*, for the assignees, referred to *Re Holthouse*. (b)

*Mr. Baggallay* replied.

THE LORD JUSTICE KNIGHT BRUCE.—The conduct of the bankrupt has been with great propriety admitted by his counsel to have been, in several respects, of a blamable description. The case, however, to say nothing of the great difference in point of age between Holthouse and the present petitioner, is not one which, in our opinion, deserves to be visited to the same extent or in the same manner as that of Holthouse; a case in the decision of which I concurred, and which I still think rightly decided.

A question has been raised, whether we are to apply here the 256th section of the Bankrupt Law Consolidation Act, as to which we must recollect that it contains the word "offences," and that there is absent from the Act—whether intentionally or unintentionally—the provision to be found elsewhere as to construing the law beneficially for creditors. At least so I believe. Having regard to these considerations, I think that the 256th section must

(a) 2 De G., M. & G. 225.

(b) 1 De G., M. & G. 237.



receive rather a strict than a large construction, and I am of opinion that, though there may have been and probably was impropriety in the conduct of the bankrupt with respect to Mr.

\* 505 Carter's \*debt, and perhaps some others, there has not been proved a contracting of a debt "by any manner of fraud or false pretence" within the meaning of the 256th section; and I believe that there is no suggestion of any other ground for the application of that section. The consequence is, that the case falls within the general discretion given by the Act of Parliament.

We have here the case of a very young man commencing business as a wine-merchant without capital, and probably known by the creditors to be without capital; not brought up, and probably known by the creditors not to have been brought up, to the business of a wine-merchant; who has acted carelessly, rashly, and imprudently in several respects, and particularly has acted so in buying goods and pledging them very soon afterwards. I am not satisfied, however, from the evidence, that it would be right to impute to him that he ever at any time bought goods with the mere view or for the mere purpose of pledging them, or for any dishonest purpose. His books have been kept regularly, and I am not aware of any instance of an untruth uttered by him. To this I have to add, that, being a married man with two children, his expenses throughout the whole period under our review have been kept within the bounds of moderation and economy. No instance has been shown of vanity, ostentation, or selfish expenditure. Taking all these circumstances together into consideration, and exercising, as I am bound to do, the best judgment that I can, my impression, speaking with great deference to the learned commissioner before whom the case has been, is that a milder decision will satisfy the demands of justice, both with regard to the particular instance and on the general ground of the interests of society, which are certainly not to be omitted from consideration in questions of this description.

\* 506 \* Taking all the facts together, I am disposed to say — and in that I believe I have the concurrence of my learned brother — that the demands of justice will be satisfied by suspending the bankrupt's certificate for two years from the 14th of June last, the date of the petition of adjudication, and directing that when granted it shall be of the third class, and that

the bankrupt shall be deprived of protection for six months from this date, but not afterwards.

THE LORD JUSTICE TURNER. — I agree entirely with what has been said by my learned brother. The statute has in certain cases rendered it obligatory upon the Court either to refuse or suspend the certificate of a bankrupt for certain offences enumerated in the 256th section. This case, however, does not, in my opinion, fall within the range of that section. Had it done so, I should, I confess, still have entertained considerable doubt whether the punishment awarded by the learned commissioner against the bankrupt has not gone too far ; for if the Court, in cases of this description, where one only of the offences enumerated has been committed, is bound to inflict the extreme penalty, I know not what is to be done where every one of the offences has been committed. I think the legislature intended to intrust the Court with a reasonable discretion to see which and how many of the offences have been committed, and what mitigatory circumstances there are to induce it to diminish the punishment which the statute has awarded.

Looking at the circumstances of this case, beyond all doubt I am bound to say that the conduct of the bankrupt has been blamable in the highest degree. No one can justify the conduct of a trader who buys goods and pledges them the next day to raise money to carry \* on his business, — a course which \* 507 must be destructive and ruinous. But, on the other hand, on examination of the accounts of the bankrupt, I find that the pressure upon him commenced in April, 1852, and that the transactions in question, although in some degree occurring before April, 1852, did not take place to any great extent till that time. I find that his books have been regularly kept, though it is admitted he did not balance them regularly. I find that his private expenses did not exceed 250*l.* a year ; and I find it stated in his affidavit, and not denied by the respondent, that for the last three years he has not been seeking to purchase goods from his creditors for the purpose of raising money ; but that the creditors, as they are far too much in the habit of doing, have pressed on the bankrupt the purchase of their goods. All these circumstances are deserving of great consideration, even if the case were within the 256th section of the statute. In my opinion it does not fall within that section, and under the 198th section the Court is bound to take all these

circumstances into consideration. Having regard to all the circumstances which I have mentioned, I think the sentence which my learned brother has mentioned is better adapted to meet the justice of the case than that of the learned commissioner.

In the Matter of WILLIAM SHAW, a Bankrupt.

1853. February 24. Before the LORDS JUSTICES.

After the senior commissioner of the Court of Bankruptcy had transacted all the business before him, and left the Court for the day, one of the other commissioners made an order for the transfer of a petition for adjudication from a district court to London. On the matter being brought before the senior commissioner, he ordered the petition to be retransferred to the district Court, considering that his absence had not been "unavoidable" within the 20th section, and that therefore the other commissioner had no jurisdiction.

*Held*, on appeal, —

First, that the absence of the senior commissioner must be considered to have been unavoidable.

Secondly, that the senior commissioner had no power to reverse the order for transfer.

Thirdly, that, as the great majority of the creditors in number and value resided in the London district, the order of transfer was right upon the merits.

THIS was a motion by way of appeal from an order made by the senior commissioner (Mr. EVANS) directing that a petition for adjudication with the proceedings thereunder, and the further prosecution thereof, should be transferred to and remain in the Court of Bankruptcy for the Leeds district, and that the bankrupt's costs of, and occasioned by, the application to the senior commissioner should be paid out of the estate.

The bankrupt carried on business, as a bookseller, stationer, toymen, and dealer in musical instruments, music, and fancy articles, in High Street, in the city of Lincoln.

On the 1st of January, 1853, he filed a petition for adjudication to the Court for the Leeds district, in which Lincoln is situated, and was found a bankrupt by that Court on the same day.

At a meeting for the choice of assignees, held at Hull on the

26th of January, the appellant, Mr. Sewell, was chosen creditors' assignee; but the registrar, who was sitting for the commissioner, refused to confirm the choice, assigning as a reason that Mr. Sewell did not \* reside within the Leeds district, and \* 509 the choice was adjourned.

On the 28th of January, 1853, Mr. Sewell, under the 20th and 90th sections of the Bankruptcy Law Consolidation Act, 1849, (a) applied to Mr. Commissioner FANE, after the senior commissioner had left the Court for the day, for an order to change the venue of the bankruptcy to London. In support of the application, he made an affidavit stating that the bankrupt was indebted to him in 440*l.* 2*s.* 6*d.* on the balance of account for goods sold and delivered; that the bankrupt had sent him a list of his debts amounting to about 1800*l.*, which were all under 100*l.* except Mr. Sewell's; that there were no creditors of the bankrupt residing at Lincoln, except a few small tradesmen, whose debts did not as to any one of them exceed 5*l.*, and in the aggregate did not exceed 25*l.*; that the greater portion of the property of the bankrupt consisted of stock in trade, which for the most part was supplied to the bankrupt by the London creditors; \* and that to sell the stock \* 510 in the most advantageous manner would require such judgment and knowledge, in giving the necessary directions, as was only possessed by persons in the trade.

Consents to the application were produced, signed by creditors whose debts amounted to 1038*l.*

Mr. Commissioner FANE thereupon ordered, that the petition for adjudication, and all proceedings thereunder, be taken off the file of her Majesty's Court of Bankruptcy for the Leeds district, and

(a) Sect. 20. "Any of the commissioners acting in London may, during vacation, or during the illness or unavoidable absence of the senior commissioner, exercise and perform the duties imposed upon the senior commissioner by this Act."

Sect. 90. "The senior commissioner shall have power, whenever he may deem it expedient, to order any petition against or by any trader to be prosecuted in any district, with or without reference to the district in which the trader shall have resided or carried on business, or to consolidate the proceedings, or any part thereof, under two or more petitions for adjudication of bankruptcy, or to impound any petition for adjudication of bankruptcy, and the proceedings thereunder, or any part thereof, upon such terms as the senior commissioner shall think fit, or to transfer any petition for adjudication of bankruptcy, and the proceedings thereunder, and the prosecution, or the further prosecution thereof, from the Court in any one district to the Court in any other district."

transmitted and removed to her Majesty's Court of Bankruptcy in London, and be there filed and further prosecuted. And it was further ordered, that the bankrupt should be paid out of the estate his reasonable expenses in travelling and attending in London, under the petition. And it was ordered that the appointment of Mr. Theophilus Carrick, as official assignee at Leeds of the bankrupt's estate, should be annulled, and he was thereby removed from being such official assignee. And it was ordered that one of the official assignees of the Court of Bankruptcy in London be appointed official assignee of the estate of the bankrupt in the place of Mr. Theophilus Carrick, thereby removed. And it was ordered that Mr. Theophilus Carrick should audit his accounts under the petition before the commissioner of her Majesty's Court of Bankruptcy for the Leeds district, before whom the petition had theretofore been prosecuted, and pay any balance which might be found in his hands to the official assignee to be appointed in London. And it was ordered, that the costs of John Sewell, of and occasioned by that application, should be paid out of the estate of the bankrupt to his solicitor.

\* 511 On the 11th of February an application was made to \*the senior commissioner, upon notice to Mr. Sewell, to retransfer the proceedings to Leeds, and the senior commissioner then made the order now under appeal.

*Mr. Russell* and *Mr. Sturgeon*, in support of the appeal. — The absence of the senior commissioner must be taken to have been unavoidable, and therefore Mr. Commissioner FANE's order was correctly made in point of jurisdiction, and the senior commissioner had no jurisdiction to disturb it. The order now appealed from is consequently wrong, and must be discharged, independently of the merits of the case. The merits, however, are also altogether on the side of the order made by Mr. FANE. The prosecution of the bankruptcy at Hull is convenient to no one except the official assignee, who is really the respondent in this case. By far the greater portion of the creditors, as well as the witnesses of the transactions leading to the bankruptcy, reside in London and Birmingham, the bankrupt resides at Lincoln, and the commissioner himself at Leeds. Why all these individuals are to be taken away to a distant place like Hull, in which no one concerned in the investigation resides, and which cannot be reached by any of the

persons whose attendance will be requisite without inconvenience, no one has yet explained.

*Mr. Swanston and Mr. Cooke*, for the bankrupt. — As to the question of jurisdiction, the legislature could not have intended by the expression “unavoidable absence” any absence whatever. The argument for the respondents would strike the word unavoidable out of the Act. The circumstance that a majority of the creditors and of the witnesses reside out of the district have never been held sufficient to induce the Court to change \* the venue. A grave and preponderating reason must be \* 512 shown, together with the absence of injury to the bankrupt.  
*Ex parte Mitchell. (a)*

*Mr. Bacon*, for the official assignee. — The arguments of the appellants as to the merits would apply to every Lincoln bankruptcy, and are in fact directed against the wisdom of the general order directing such bankruptcies to be prosecuted at Hull.

February 24.

THE LORD JUSTICE KNIGHT BRUCE. — The question in this case (which has occupied one-third of a judicial day) arises under the bankruptcy of a shopkeeper at Lincoln, who traded as a stationer, a dealer in musical instruments and music, and a toyman. He made himself a bankrupt at Lincoln, which is in the Leeds district, and accordingly it was, I suppose, necessary that the bankruptcy should be opened, in the first instance at least, within that district, and that the business of the administration of the bankruptcy, at least in the first instance, should be carried on at Leeds or Hull, each in a different county from Lincoln, and each at a considerable distance from it. It appears, however, that the great bulk of the bankrupt's creditors, I think more than three-fourths in amount, resided in London and Birmingham. It appears, also, that the majority in value of the bankrupt's creditors were desirous that the operations in the bankruptcy should be carried on in London; and, considering the position of Hull with reference as well to Birmingham and London as to Lincoln, and the position of Birmingham and Lincoln with reference to London, I have no

doubt whatever, after having heard all that has been urged in respect of the merits of the case (if "merits" is a proper term to use), that the interests of the creditors generally, and the

\* 513 \* interests of justice, so far as there is any difference in the terms, will be best consulted by having the operations in the bankruptcy carried on in London, rather than at Hull; and that there is a grave and preponderating case requiring the Court to interpose for the purpose. That view renders it necessary to consider the question of jurisdiction, there being no doubt upon the merits; with respect to the question of jurisdiction, my impression is, that the order made by the senior commissioner, on the 11th instant, at variance as it was intended to be and is with the order made by another learned commissioner, Mr. FANE, was an order without jurisdiction; an opinion which I give independently of any question whether the order of Mr. Commissioner FANE was or was not strictly regular. Into that latter question of strict regularity I decline to enter, thinking it entirely unnecessary to do so. I think, and, as I believe, my learned brother thinks, that on the merits, and substantially, the order of Mr. Commissioner FANE was entirely right, and that the terms of that order ought to regulate the course now to be adopted. We think, also, that the choice of Mr. Sewell as assignee should stand, but entirely without prejudice to the discretion of the London commissioner, before whom this case shall come, to direct a new choice if he shall think fit. With regard to the costs of the present application, the appellant's costs should, as we conceive, come out of the estate. We consider that costs not exceeding 10*l.* should be allowed to the bankrupt; and that costs also of this application not exceeding 10*l.* should be allowed to the official assignee of Leeds. We are of opinion that the costs of the application to Mr. Commissioner EVANS, which produced the order of 11th February, should be borne thus,—that Mr. Sewell should have his out of the estate, and that the bankrupt should not be allowed any.

\* 514 \* THE LORD JUSTICE TURNER. — This case involves two questions; one of jurisdiction, the other that of expediency. As to the former, the state of the case is this: An order was made by Mr. Commissioner FANE after the senior commissioner had left the Court for the day, transferring the proceedings to London. Subsequently application was made to Mr. Commis-

sioner EVANS, the senior commissioner, to take back the proceedings from London to Hull. Now the section provides:— [His Lordship read it.] I am of opinion, on the question of jurisdiction, that, as the senior commissioner was not in Court when the order in question was applied for, but having performed his functions for the day had left the Court, he must be considered as having been “unavoidably absent” within the meaning of the 20th section of the statute, and consequently that it was in the power of Mr. Commissioner FANE to make the order which he did, and that the order afterwards made by Mr. Commissioner EVANS to take back the proceedings to Hull was an order *ultra vires*, while the order of Mr. Commissioner FANE remained undischarged. With reference to the question of expediency, I think it plain that it will be for the convenience and benefit of the great majority of the creditors that the proceedings in this bankruptcy should be prosecuted in London. In my opinion, therefore, the order of the 11th instant is wrong, both upon the merits and on the ground of want of jurisdiction.

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\* *Ex parte* JOSEPH BOYLE and CHARLES BOYLE, \* 515  
In the Matter of SAMUEL BOYLE, a Bankrupt.

1853. March 21, 22. Before the LORDS JUSTICES.

Two creditors had entered up judgment against a trader on a warrant of attorney, but had not registered it according to the 1 & 2 Vict. c. 110. They attended a meeting for investigating the affairs of the debtor, and were there informed by a solicitor, who attended on behalf of the general creditors, that he had in his pocket the means of preventing them from obtaining any preference. The solicitor had with him at the time a declaration of insolvency which he had previously obtained from the trader. Having made the above statement, he inquired (as he deposed) of the judgment creditors whether they intended to seek any preference by means of their judgment, and received an answer from them in the negative, but he purposely abstained from mentioning registration. On the investigation taking place it had appeared that the trader had freehold property of considerable value, and the further investigation was adjourned to an appointed day. The solicitor forbore to file the declaration of insolvency, but the judgment creditors registered their judgment a few days after that of the meeting. On the trader becoming bankrupt some months afterwards: *Held*,—

1. That the judgment creditors had not precluded themselves from registering



- their judgment, and that the promise made by them (if any) was *nudum pactum*, and one into which they had been drawn, and not a representation acted upon by another party by which they were equitably bound.
2. That the general creditors, having allowed so long a time to pass without taking any step to set aside the proceeding, could not resist the priority thereby obtained.
  3. That since the passing of the Bankrupt Law Consolidation Act, the law as laid down in *Re Ferrin* (2 Drury & Warren, 147) is inapplicable, and that a registered judgment, although entered up on a warrant of attorney, and although not followed by execution, now constitutes a valid lien on the lands of a bankrupt after the lapse of a year from the time when it was entered up.

THIS was an appeal from the dismissal by Mr. Commissioner BALGUY of the appellant's petition claiming a lien upon the proceeds of certain freehold hereditaments of the bankrupt at Fenton in Staffordshire, under the 1 & 2 Vict. c. 110, § 13, (a) in \* 516 respect of a judgment \* debt, and praying for the usual order in the case of an equitable mortgage.

(a) "That a judgment already entered up, or to be hereafter entered up against any person in any of her Majesty's Superior Courts at Westminster, shall operate as a charge upon all lands, tenements, rectories, advowsons, tithes, rents, and hereditaments (including lands and hereditaments of copyhold or customary tenure) of or to which such person shall at the time of entering up such judgment, or at any time afterwards, be ~~seised~~, possessed, or entitled for any estate or interest whatever, at law or in equity, whether in possession, reversion, remainder, or expectancy, or over which such person shall at the time of entering up such judgment, or at any time afterwards, have any disposing power which he might, without the assent of any other person, exercise for his own benefit, and shall be binding as against the person against whom judgment shall be so entered up, and against all persons claiming under him after such judgment, and shall also be binding as against the issue of his body, and all other persons whom he might, without the assent of any other person, cut off and debar from any remainder, reversion, or other interest in or out of any of the said lands, tenements, rectories, advowsons, tithes, rents, and hereditaments; and that every judgment creditor shall have such and the same remedies in a Court of Equity against the hereditaments so charged by virtue of this Act, or any part thereof, as he would be entitled to in case the person against whom such judgment shall have been so entered up had power to charge the same hereditaments, and had by writing under his hand agreed to charge the same with the amount of such judgment debt and interest thereon: Provided that no judgment creditor shall be entitled to proceed in equity to obtain the benefit of such charge until after the expiration of one year from the time of entering up such judgment, or in cases of judgments already entered up, or to be entered up before the time appointed for the commencement of this Act, until after the expiration of one year from the time appointed for the commencement of this Act, nor shall such

The bankrupt up to the year 1847 carried on business as an earthenware manufacturer at Fenton, in copartnership \* with George Eugene Mayer and Robert Brown. The \* 517 partnership was in that year dissolved, and the bankrupt took to the concern. The business had formerly belonged to the father of the bankrupt, and at the time of the dissolution there was owing from the bankrupt to his brothers Joseph Boyle and Charles Boyle, the present appellants, as trustees under the father's will, the sum of 8600*l*. To secure the payment of this sum by instalments, the bankrupt gave the appellants a warrant of attorney dated the 24th of April, 1848, on which judgment was entered up on the 27th April, 1848. Default having been made in payment of the instalments, the bankrupt received in 1851 several letters from the appellants, complaining of the non-payment, and threatening that unless the money were paid they would issue execution.

On the 2d of February, 1852, Mr. Ward, a solicitor of Newcastle, was consulted by creditors of the bankrupt, whose debts amounted to 3000*l*., and had their instructions to make a full investigation into the bankrupt's affairs, and ascertain his true position and prospects. He accordingly came to London on the 6th of February, 1852, and having ascertained that the appellants had not registered their judgment, he obtained a declaration of insolvency from the bankrupt as a preparatory step.

On the 9th of February Mr. Ward again came to London, and on the 10th of February, 1852, Mr Ward, the bankrupt, the appellants, and Messrs. Mayer and Brown, who were creditors of the bankrupt, met by appointment at Bacon's Hotel in Great Queen Street, Lincoln's Inn Fields. Soon after they had assembled Mr. Ward asked the bankrupt to retire, and when he had done so, Mr. Ward told the appellants, one of whom (Mr. Charles \* Boyle) was in practice as a solicitor, that a partial in- \* 518

charge operate to give the judgment creditor any preference in case of the bankruptcy of the person against whom judgment shall have been entered up, unless such judgment shall have been entered up one year at least before the bankruptcy: Provided also, that as regards purchasers, mortgagees, or creditors, who shall have become such before the time appointed for the commencement of this Act, such judgment shall not affect lands, tenements, or hereditaments otherwise than as the same would have been affected by such judgment if this Act had not passed: Provided also, that nothing herein contained shall be deemed or taken to alter or affect any doctrine of Courts of Equity, whereby protection is given to purchasers for valuable consideration without notice."

quiry had been made into the bankrupt's affairs, which appeared to be in a critical position. Mr. Ward then asked the appellants whether they would assist in making a thorough investigation into the state of the bankrupt's affairs, and upon their assenting to this course, Mr. Ward said that before he proceeded any further he should require an assurance from the appellants that they would not seek to obtain any preference by virtue of their judgment. He pointed to his pocket in which he had the declaration of insolvency, and said he had there the means of preventing them obtaining any preference, but should not say what they were; but he added, "Mr. Charles Boyle knows." To this the appellant Joseph Boyle replied: "Certainly not; we should never think of doing so under such circumstances as these." Mr. Ward then said: "What do you say, Mr. Charles?" Charles Boyle replied: "Certainly not." The bankrupt was then called into the room, and a full inquiry was made into the nature and extent of his debts and liabilities, and also of his assets; and the appellants then learned for the first time that the bankrupt was entitled to freehold lands of the value of 2000*l.*, which were wholly unincumbered, besides other lands which were subject to mortgages. At the conclusion of the investigation another meeting was appointed for the 9th of March.

The account which the appellants gave of this meeting only differed from that of the respondent as to the words of Mr. Ward's question, which the appellants stated were not generally whether they would take any preference, but whether they would issue execution. Mr. Ward stated in his affidavit that he had intentionally abstained from saying any thing about registration.

On the 13th of February the appellants registered their judgment.

\* 519 \* A meeting of creditors was held on the 9th of March as it had been appointed, and certain proposals were then submitted to the creditors. At this meeting the propriety of the conduct of the appellants in registering the judgment after the assurances which they had given on the 10th of February was attacked, and was defended by the appellants. No arrangement was then come to. Another meeting was subsequently held, but without any result.

In the early part of May the bankrupt filed a petition in the Bankruptcy Court under the arrangement clauses of the Bankrupt

Law Consolidation Act. The petition was, however, dismissed by the Court, and upon this dismissal as an act of bankruptcy, a creditor on the 7th of June, 1852, obtained an adjudication.

The appellants then presented the petition from the dismissal of which they now appealed.

*Mr. Swanston and Mr. T. H. Terrell*, for the appellants. — The commissioner's decision proceeded upon the ground that the appellants had entered into an engagement with Mr. Ward not to register their judgment. That, however, is not the result of the evidence. According to the affidavits of the appellants the engagement was not to issue execution, and Mr. Ward states that registration was intentionally not mentioned. It is clear that the appellants understood execution alone to have been referred to. If Mr. Ward required them to stipulate against registration, why did he not at once state that there was considerable real estate belonging to the bankrupt, and that he desired the appellants to forego the priority which they might obtain by registering their judgment? But even supposing any engagement to have been entered into, it was merely *nudum pactum*, \* and could not have been enforced, \* 520 nor is it alleged to have been of any definite kind. Can it be supposed that the appellants would have undertaken generally under the circumstances not to enforce their judgment?

*Mr. Rolt and Mr. De Gez*, for the respondents. — The petition is one entitled to no favour, for it is an application to a jurisdiction established for the purpose of equal distribution of a bankrupt's assets seeking a preference, and it is an application to a Court of Equity to give effect to a proceeding taken in breach of good faith. The commissioner rightly thought that the latter circumstance excluded the appellants from the assistance of the Court. It was not necessary that there should be a formal agreement. The appellants represented that they would take no preference. That representation was, as they knew, acted upon. They, or one of them, who was a solicitor, knew that if the representation had not been made, Mr. Ward would have instantly filed the declaration of insolvency which he had in his pocket, and that all possibility of priority would then have been taken away. His engagement not to do so prevented the contract from being *nudum pactum*, for he had precluded himself from acting; and if he had

filed the declaration after obtaining the assurance from the appellants, and an adjudication had followed, it would have been annulled as fraudulent. *Ex parte Harcourt*, (a) *Ex parte Lowe*. (b) Having obtained his forbearance to proceed by making an express promise, they cannot obtain the assistance of this Court to enable them to profit by a breach of faith. Indeed, a Court of Equity would even actively interfere to restrain such a proceeding: *Money v. Jordan*, (c) *Hammersley v. De Biel*; (d) but we only ask the Court to be passive.

\* 521 \* There is, moreover, at least considerable doubt whether the appellants are, independently of the equities of the case, entitled to any priority, and this doubt is sufficient to induce the Court to refrain from interfering. For it does not under the jurisdiction in bankruptcy make an order giving priority upon an equitable mortgagee's petition except in plain cases, but leaves the petitioner to enforce his claim against the assignees by the ordinary proceedings in Chancery.

The only claim which the appellants have is founded upon the 1 & 2 Vict. c. 110, § 13, providing that a judgment entered up against any person shall operate as a charge upon all lands of or to which such person shall at the time of entering up such judgment be seised, possessed, or entitled for any estate or interest, and that every judgment creditor shall have the same remedies in a Court of Equity against the hereditaments charged by the Act, as if the person against whom the judgment is entered up had by writing under his hand agreed to charge the same with the amount of the judgment debt and interest. The question is whether this enactment was intended to have and has the effect of altering the law which has been continued ever since the 9 James 1 down to the present time, (e) and which provides that no creditor, having security for his debt, shall receive upon any such security more than a ratable part of such debt except in respect of any execution served and levied, or any mortgage of or lien upon any part of the property of the bankrupt before the date of the commission, fiat, or petition for adjudication. If the appellants succeed, this will be the first case since the time of James the First in which a

\* 522 judgment creditor who has not issued execution \* has been

(a) 2 Rose, 203.

(c) 2 De G., M. & G. 318.

(b) 1 Gl. & J. 78.

(d) 12 Cl. & Fin. 84.

(e) 6 Geo. 4, c. 16, § 108; 12 & 13 Vict. c. 106, § 184.

allowed priority over the general creditors. Now in the first place it would be very singular that an Act which is designed for the purpose of providing an equal distribution of the effects of insolvents (who are not traders) among their creditors, and which is framed upon the model of the Bankrupt Law, should be intended thus to alter, in a retrograde direction, one of the most salutary provisions of the Bankrupt Law for effecting equal distribution among creditors, and more especially that this intention should, if it existed, not have been declared. Do, then, the two enactments conflict with one another? Is the provision that no creditor having security for this debt shall receive more than a ratable part of his debt, except in respect of an execution levied or a mortgage or lien, inconsistent with the provision that a judgment shall constitute a lien? Or is not the meaning of the latter provision that a judgment may constitute a lien, but not such a lien as to be within the exception intended in the Bankrupt Act? In considering this question it must be borne in mind that the 1 & 2 Vict. c. 110, was not intended to affect the administration of assets of traders under the Bankrupt Law. The law which it was intended to amend and reform (and which much needed amendment and reformation) was that applicable to persons who were not traders, and who had never been completely brought within provisions like those of the Bankrupt Law, but who might be, as one of your Lordships observed in another case, (a) "at once wealthy and insolvent." It is with reference to these cases that its provisions are to be read. They ought not, in fair and rational construction, to be used to disturb and impair another branch of the law which had long previously been rescued from such a reproach.

Judgments operated as a general lien before \* the 1 & 2 \* 523 Vict. c. 110, and yet they were expressly decided not to fall within the word "lien" in the Bankrupt Act. *Brace v. Duchess of Marlborough*. (b) All that the Act has done is to make them specific liens, but it has not said that it has thereby brought them within the exception. The proviso that the charge shall not operate in case of bankruptcy until after the lapse of a year may be relied upon as a negative pregnant; but it is sufficient to say that such a provision would be required in a conceivable state of circumstances; viz., where a judgment creditor had taken the

(a) *Tombs v. Roch*, 2 Coll. 503.

(b) 2 P. Wms. 491.

land in execution as in *Bull v. Faulkner*. (a) In such a case he would fall within the exception, and the execution would give effect to the charge in all such cases but for this proviso. These arguments are strongly supported by the observations of Lord St. LEONARDS in *Re Perrin*. (b) It is true that the judgment in that case was entered up upon a warrant of attorney, and that the present Act differs from its predecessor, (c) and the corresponding Irish Act, (d) in the omission of the words expressly depriving such judgments of any effect in giving priority. But the reasoning of Lord St. LEONARDS extends beyond the mere facts of the case; his Lordship said: "The Act of Victoria (whether wisely or not I am not here to consider) gave a great increase of security to judgment creditors beyond what they had previously enjoyed; but it does not profess to alter generally the relation of debtor and creditor in bankruptcy; it left them where it found them; it contains provisions to prevent persons catching judgments by means of warrants of attorney; it gives judgment creditors more extended powers than before; and the 22d section leaves every

\* 524 judgment \* creditor all the rights which he had previously possessed; but can it be said to have relieved those rights from the restrictions, subject to which they had been formerly enjoyed? Was the judgment creditor intended to have not only the additional rights, but also the abolition of all restrictions upon the previous rights? I am bound to give to both these statutes a sensible construction; and, in my opinion, the true view, as far as they are *in pari materia*, is that which dovetails the enactments of one with the other. A prior statute may operate upon a subsequent Act of Parliament, without express words; the Statute of Uses, for instance, operates upon the Statute of Wills, although the former did not contemplate devises; and so may the statute of William act upon that of Victoria, and they may together form a sensible and rational system; and I see nothing in opposition to this construction. There is no reason why, as between the judgment creditor and the other creditors in bankruptcy, judgments should not be considered in one light, and as between the creditors themselves where there is no bankruptcy, in another. It is not inconsistent to give to judgment creditors generally the advantages of the statute of Victoria, where there is no bankruptcy, and yet

(a) 1 De G. &amp; Sm. 685.

(c) 6 Geo. 4, c. 16, § 108.

(b) 2 Dr. &amp; War. 147.

(d) 6 Will. 4, c. 14, § 126.

not to repeal the provisions of the statute of William in the case of bankruptcy." And in a second judgment after a second argument his Lordship thus expressed himself: "The principle upon which *Whitmore v. Robertson* (a) was decided is, that the later Act should not operate beyond its immediate purpose where there was no conflict and no apparent intention to repeal the former provision. I must apply the same principle to this case. Now here, whilst the judgment was a general lien, and would bind only part of the debtor's property, the creditor, where the judgment \* was on a warrant of attorney, was prohibited by \* 525 our Bankrupt Act from having the benefit even of his execution (and in this case there was not any execution) unless there had been a sale before the act of bankruptcy. The Act of 3 & 4 Vict. (b) extends every judgment as a charge on all the debtor's property, but there is no reason (unless it be so enacted) why that which, as a general lien, was subject to be cut down in bankruptcy, should not remain subject to that liability, although it has become a specific charge." As Lord ST. LEONARDS was dealing with a case then which fell exactly within the latter words of the clause of the Irish Act then in force corresponding with the 108th section of the 6 Geo. 4, c. 16, denying priority to judgments entered up on warrants of attorney, it was not necessary for him to consider the earlier part of the clause which still remains in force. But the earlier part which provides that no creditor having security shall have priority except in respect of execution levied, or a mortgage or lien, is equally within the scope of his observations, and the words as to judgments on warrants of attorney were added in the former Act to exclude such judgments from priority even when followed by execution levied, and not to give priority in contradiction to the earlier words to other judgments not followed by execution. We submit, therefore, that the omission in the present Bankrupt Act of the provision as to judgments upon warrants of attorney does not exclude the application of the reasoning in *Ex parte Perrin*, and that the 1 & 2 Vict. c. 110, § 13, did not give a preference to any judgment creditor who had not sued out execution. Is its effect altered in the sense of giving priority by the omission of a few words in the present Bankrupt Act relating entirely to judgments on warrants of attorney,

(a) 8 M. & W. 463.

(b) This is the Irish Act, corresponding with 1 & 2 Vict. c. 110.



\* 526 \* especially when such an alteration is completely at variance with the whole object of the Act? If the legislature had intended to alter the law which had denied priority to judgment creditors who had not sued out execution, it would not have done so merely by the omission of a clause with respect to judgments of one particular kind. If judgments are alone sufficient to give priority, why should execution be required to be completed by seizure?

There is one more point on which alone the commissioner's judgment may if necessary be supported. The 19th section of the 1 & 2 Vict. c. 110, provides that no judgment shall by virtue of that Act affect any lands as to creditors unless and until it is registered. Coupling this with the provision of the 13th section which enacts that the creditor shall not proceed to obtain the benefit of the charge until after the expiration of one year from the time of entering up the judgment, can it be said that it does not affect lands if the year is held to begin to run before registration?

Their Lordships only required to hear a reply as to that part of the argument in the course of which *Re Perrin* had been cited.

*Mr. Swanston*, in reply. — The decision in *Re Perrin* turned entirely on the provision that no creditor, though for a valuable consideration, who should sue out execution upon any judgment obtained by default, confession, or *nil dicit*, should avail himself of such execution to the prejudice of other fair creditors, but should be paid ratably with them. This provision was repealed and not re-enacted by the Bankrupt Law Consolidation Act, an alteration in the law which entirely destroys the argument of the respondents' counsel and the applicability of *Re Perrin*.

\* 527 \* THE LORD JUSTICE TURNER. — This case comes before us on appeal from the decision of the commissioner, who refused to make an order upon an application by judgment creditors claiming as equitable mortgagees to have an account taken and their security realized. The judgment was obtained on the 27th of April, 1848; it was not registered till the 13th of February, 1852; and in the mean time a meeting took place on the 10th of February, 1852, at which the bankrupt was present, the persons on whose behalf the judgment had been entered up were also

present, as were also two other persons, creditors of the bankrupt. The ground upon which the learned commissioner refused to make an order was this: that at the meeting of the 10th of February an undertaking was given on the part of the present petitioners that they would not take any preference nor do any act by which to obtain one. It is very much in dispute upon the affidavits, whether the undertaking which was given was not simply an undertaking that they would not issue execution upon the judgment. Of course, if it were an undertaking to do no act by which to obtain a preference, it would amount to an undertaking not to register the judgment, by which preference would be obtained. It appears to me that there are three grounds upon which this order ought to have been made, apart from the question of law as to the effect of the judgment, if fairly and properly registered.

I think that the true test by which to try the question as to the effect of the alleged undertaking, is by considering whether upon a bill filed in this Court for the purpose of restraining the registration of the judgment, or any proceeding upon that registration, or to make void the registration, if made, the parties with whom that undertaking was entered into could or could not have succeeded. I take that question very much to \* depend upon the correlative question whether, if the \* 528 judgment creditors had on their part filed a bill in this Court for the purpose of restraining Mr. Ward's clients from proceeding upon the declaration of insolvency, they could have maintained that bill. Now it seems to me that there was no undertaking given on the part of the persons who represented the bankrupt and the general creditors that the declaration of insolvency which had been signed, and was in the pocket of Mr. Ward at the time of the meeting of the 9th of February, should not be acted upon; and I take it that in the absence of such an undertaking the judgment creditors could not have succeeded in an application to restrain proceedings in bankruptcy upon the declaration of insolvency. If, then, on the one hand, the judgment creditors could not have succeeded in an application to restrain the proceedings in bankruptcy, so neither, on the other hand, could the parties who had the declaration of insolvency have succeeded in an application to restrain the judgment creditors from proceeding with the registration. That is the first ground upon which it appears to me that the order ought to have been made.

The second ground is this. I confess that it appears to me, upon the evidence, that the appellants were in fact drawn into the promise not to register their judgment, if any promise can be taken to have been made by them. For what are the facts? Mr. Ward came up to London on the 9th of February. He examined the registry for the purpose of seeing whether the judgment was registered, and found it was not registered. Then the meeting took place on the 10th of February. He says in his evidence that he did not mention the registration of the judgment, and that he purposely avoided mentioning it at that meeting. Now when the appellants were asked whether they would do any act \* 529 to obtain \* a preference, there had been a communication before (as appears by the evidence) on the subject of issuing execution on the judgment, and it may well be that they understood Mr. Ward's question as asking whether they would or not issue execution upon the judgment. Taking this into consideration, together with the fact of Mr. Ward saying nothing about registration, I think that in that state of circumstances such a promise, even if given to the extent contended for, is one which the Court would not enforce as against the judgment creditors.

The third ground upon which the order ought to have been made is this: It appears that so long ago as the 9th of March, 1852, there was a meeting of creditors, at which the good faith or bad faith of registering the judgment was called in question; that the appellants insisted on its validity, and that no proceedings were taken to impeach it. Upon all these grounds I am of opinion that there ought to have been an order made in favour of these petitioners, as in the case of a mortgage, if a judgment properly registered can entitle them to such an order.

But a question of law has been raised for the respondents, and fully argued, namely, this, whether the Statute 1 & 2 Vict. c. 110, § 13, which creates the charge in favour of a judgment creditor upon the estate of a person against whom the judgment is obtained does or does not apply to cases of bankruptcy, and the case of *In re Perrin* has been cited upon this question. Now, whatever may be the effect of that decision, it proceeded upon an enactment in Ireland which contained a clause similar to the 108th section of the Statute 6 Geo. 4, c. 16, a provision which has been repealed, and has not been re-enacted. The question therefore is \* 530 not, as it was in *Re \* Perrin*, whether upon such words

as are contained in 1 & 2 Vict. c. 110, § 13, and such as were contained in the 108th section of the 6 Geo. 4, c. 16, there is a lien upon the land, but whether there is such a lien under the words of the 1 & 2 Vict. c. 110, § 13, and those of the present Bankrupt Act, that is to say, whether the 13th section of the 1 & 2 Vict. c. 110, created a charge upon the estate of the bankrupt from the time of registration, and, if so, whether this charge is or is not cut down in the present case by the 12 & 13 Vict. c. 106.

Now there can be no doubt upon the construction of the 1 & 2 Vict. c. 110, § 13. That statute makes the judgment a charge upon the land of the debtor, and gives the creditor the same remedy as if the debtor had signed a memorandum agreeing to give a charge. It therefore constituted the judgment creditor an equitable mortgagee, and, as I take it, upon the construction of the Act, makes him an equitable mortgagee, from the time of registering the judgment; for the 19th section of the same Act says, that no judgment of any of the superior Courts shall by virtue of the Act affect any lands, tenements, or hereditaments, as to purchasers, mortgagees, or creditors, unless or until a memorandum or minute containing the particulars thereof shall be left with the senior Master of the Court of Common Pleas. I take it to be clear from this that the judgment must affect the lands from the time of registration, because when the 19th section of the statute says that the judgment shall not affect the lands unless and until a memorandum is entered, the necessary implication is that it does affect them at the time when the memorandum is entered. The consequence is, that a charge is created at the time of entering the memorandum with a suspension in point of remedy for a year after the time of entering up the judgment. The charge exists, \* although the remedy is not to be put in force until \* 531 the expiration of a year. That being so, under the Statute 1 & 2 Vict. c. 110, § 13, we are then to look at the Statute 12 & 13 Vict. c. 106, § 184, to see whether the charge thus created is cut down. That section provides "that no creditor having security for his debt, shall receive upon any such security more than a ratable part of such debt, except in respect of any execution or extent served and levied by seizure and sale upon, or any mortgage of, or lien upon any part of the property of such bankrupt before the date of the fiat, or the filing of a petition for adjudication of bankruptcy." Thus far the provisions of the section

amount to this,—that a person who has a lien on any part of the property of the bankrupt before the filing of the petition for adjudication, may have and is entitled to a preference under that lien, and is not to be bound by the first part of the clause enacting that no creditor is to receive more than a ratable part of his debt. Can it then be said that a creditor, who under 1 & 2 Vict. c. 110, § 13, has as good an equitable charge upon all the lands, tenements, and hereditaments of his debtor, as if the debtor had charged them by a written memorandum, has not a lien upon part of his property within the meaning of the Statute 12 & 13 Vict. c. 106, § 184? I am clearly of opinion that the charge created by the Statute 1 & 2 Vict. c. 110, § 13, is a lien within the meaning of the 12 & 13 Vict. c. 106, § 184. Then arises the question whether the lien falls within the other parts of the 184th section of 12 & 13 Vict. c. 106, providing that nothing therein contained shall be deemed to give validity to any warrant of attorney, cognovit, or consent to a Judge's order, declared to be null and void by any provision of the Act, nor to give validity to any judgment entered up under or by virtue of any such warrant of attorney or

\* 532 consent, or to any execution or \* extent executed or levied under or by virtue of any such warrant of attorney, cognovit, or consent. I can see nothing in that proviso to take away in the present case the effect of the Statute 1 & 2 Vict. c. 110, § 13, creating the lien. I think, therefore, that the argument now under consideration cannot be maintained, and that the appellants are entitled to be treated as equitable mortgagees.

THE LORD JUSTICE KNIGHT BRUCE.—In this case, whatever may be thought of any conduct of the parties on either side out of Court, the litigants, when in Court, have certainly conducted themselves in a praiseworthy manner; for the evidence of the petitioners is less in favour of themselves than of the respondents, and that of the respondents is less in favour of themselves than of the petitioners. But whether the case is taken upon the evidence on one side or the other, or upon the evidence on both sides taken together, I am of opinion that, for want of consideration, and perhaps not for that reason only, there was not a binding contract or a binding promise of any kind made on the part of the petitioners at the meeting of February 10, 1852, upon which so much stress has been laid during the argument.

That reduces the case to a question of law; viz., whether the 13th section of the Statute 1 & 2 Vict. c. 110, gives a lien, the judgment having been entered up more than a year before the bankruptcy and the registration having taken place before the bankruptcy. There is no doubt, nor could there be any doubt, upon this point but for the argument, which we have heard, founded upon the Consolidation Act of 1849. Now the Consolidation Act of 1849 begins by repealing certain Acts and parts of Acts of Parliament set forth in Schedule A, and the \* language of \* 533 the repealing section is this, "that from and after the commencement of this Act, the several Acts and parts of Acts set forth in Schedule A to this Act annexed, to the extent to which such Acts or parts of Acts are by such schedule expressed to be repealed, and every other Act or Acts, and such parts of every other Act or Acts as shall be inconsistent with this Act shall be repealed, except so far as the said Acts or parts of Acts, or any of them whatsoever, mentioned or included in the said schedule or not, repeal any former Act or part of an Act," &c. Turning to Schedule A, we find that this Statute 1 & 2 Vict. c. 110, is mentioned in it; but it is expressed to be repealed only "so far as relates to the manner of making bankrupt any trader within the meaning of the laws then in force respecting bankrupts, upon the filing of an affidavit or affidavits of debt or debts in the Court of Bankruptcy, and after notice in writing requiring immediate payment of such debt or debts." The Consolidation Act of 1849, therefore, mentioning and referring to this Act of the 1 & 2 Vict. c. 110, pointedly abstains from interfering with the clause which is here in question. Then the 184th section of the Act preserves liens on the bankrupt's property.

This judgment, registered in the manner that I have mentioned, having been by the legislature declared to form a lien on his property, and there being neither exception nor qualification in any other part of the Act, to take away from the creditor the benefit of the lien thus given, the petitioners are entitled to the usual equitable mortgagee's order, with the costs before the commissioner and here, as in the case of a written security.

\* 584 \* *Ex parte* the Rev. JOHN HOPKINS BAILEY and  
WILLIAM CARTER.

In the Matter of JOHN BARRELL, a Bankrupt.

1853. April 29. May 6. Before the LORDS JUSTICES.

A trader, when insolvent and subject to two judgments, conveyed and assigned to certain creditors real property (incumbered to its full value), certain policies of assurance, and all his credits, together with his books of account (being all his property except his furniture and stock in trade), by way of mortgage, to secure the debt due to the creditors. Executions had been issued on the judgments, and the furniture and stock in trade had been seized under them at the time of the assignment. The trader became bankrupt: *Held*, that the assignment was void as against the assignees under the bankruptcy, although the bankrupt might not have been aware when he executed it that the executions had issued.<sup>1</sup>

Principles on which assignments are void, as preventing the continuance of trade.<sup>2</sup>

THIS was an appeal from the dismissal of a petition presented by the appellants, as trustees of the Barnstaple and Chafford Benefit Building Society at Billericay, claiming the proceeds of certain property, which was comprised in an assignment executed to them by the bankrupt, and which had been sold by the assignees under an arrangement between them and the appellants.

The bankrupt had for a considerable time carried on business as a grocer at Billericay, and had also filled the office of treasurer of the Barnstaple and Chafford Benefit Building Society. A Mr. Woodard, who was the solicitor to the trustees of the society, was also solicitor to the bankrupt down to the 19th of December, 1851.

In June, 1851, an action was commenced against the bankrupt at the suit of Mr. Woodard and Mr. Robert Manistree, brother-in-law of the bankrupt, for 500*l*. Judgment was obtained at the same time. On Friday afternoon, the 19th of December, 1851, it was discovered that the bankrupt had not paid into the bank a sum of money which he had received on account of the society.

<sup>1</sup> See *Stanger v. Wilkins*, 19 Beav. 626; *Ex parte Bland*, 6 De G., M. & G. 757; *Ex parte Taylor*, 5 De G., M. & G. 392; *Johnson v. Fesemeyer*, 3 De G. & J. 13; S. C., 25 Beav. 88.

<sup>2</sup> See *Ex parte Foxley*, *In re Nurse*, L. R. 3 Ch. Ap. 515.

The trustees sent for him on that day, and asked him \* whether he was prepared to pay the deficiency. He told \* 535 them that he had no money, but would give them what security he could, and went to Chelmsford to see some relations of his, two of whom agreed to become sureties to the society.

On the morning of Saturday, the 20th of December, execution was issued on the judgment of June, 1851, and another execution was at the same time issued against the bankrupt on another judgment. On the same day the bankrupt attended a meeting of the trustees of the society, who agreed to take the offered security, but required him also to execute a deed which they had prepared, and which was the assignment in question. He asked what was the effect of the deed, and when it had been read over to him he agreed to execute it, and did so accordingly on the evening of that day.

By the deed, which was dated the 20th of December, 1851, and was made between the bankrupt of the one part and the appellants of the other part, it was witnessed that in consideration of the sum 777*l.* 14*s.* 9*d.* then due and owing from the bankrupt as treasurer of the society to the appellants as trustees of it, the bankrupt for himself, his trustees, executors, and administrators, thereby covenanted with the appellants, their executors and administrators, that he, his heirs, executors, or administrators, would pay unto the appellants, their executors, administrators, or assigns, the sum of 777*l.* 14*s.* 9*d.*, with interest for the same after the rate of 5*l.* per cent per annum, together with the costs, charges, and expenses of proposing, preparing, and executing that security and incident thereto. And it was also witnessed that for the consideration aforesaid the bankrupt, by virtue of every power enabling him in \* that behalf, did thereby irrevocably appoint to the \* 536 uses thereafter limited, and did also by such indenture grant, release, and convey unto the appellants, their heirs and assigns, all the freehold messuages or tenements, lands, hereditaments, and premises whatsoever and wheresoever of him, the bankrupt, and also all other the freehold hereditaments in or to which the bankrupt had any legal or equitable power of appointment or disposition, to hold the hereditaments and premises thereinbefore conveyed unto and to the use of the appellants, their heirs and assigns, subject, nevertheless, to certain existing mortgages thereon and to the provisions thereafter contained. And



it was further witnessed that, for the consideration aforesaid, the bankrupt did thereby, for himself, his heirs, executors, and administrators, further covenant with the appellants, their heirs, executors, and administrators, that he, the bankrupt, and his heirs, and all other necessary parties, would or should, when requested by the appellants, their heirs, executors, administrators, or assigns, but at the costs of the bankrupt, his heirs, executors, or administrators, effectually surrender, or otherwise convey and assure, all the copyhold or customary messuages or tenements, lands, hereditaments, and premises whatsoever and wheresoever of him, the bankrupt; and also all other the copyhold or customary hereditaments in, to, or over which he has any legal or equitable estate, interest, claim, or demand, power of appointment, or disposition, to the use of the appellants, their heirs and assigns, or as they or he should direct, subject to the before-mentioned mortgages. And it was further witnessed, that, for the considerations thereinbefore expressed, he, the said bankrupt, did by such indenture grant and assign unto the appellants, their executors, administrators, and assigns, all the surplus rents and profits of the several free-

\* 537 hold and copyhold hereditaments and premises devised \* in trust or otherwise by the will of Savage Barrell, deceased, and to which the bankrupt was beneficially entitled, subject to the before-mentioned mortgages; and also all legacies, bequests, or interests under any will; and also a certain policy of assurance upon the life of the bankrupt for 1000*l.* in the London Life Assurance Office; and also a policy upon the life of James Giles for 300*l.* in the Norwich Union Life Assurance Office; and also a policy upon the life of Joseph Bishop in the Eagle Life Assurance Office; and all sums of money thereby respectively assured, and all benefit and advantage thereof; and also all debts or sums of money whatsoever then due and owing to the bankrupt from any person or persons whomsoever; and all bills of exchange, promissory notes, or other securities for or evidence of such debts; and all books of account in which such debts or sums of money were entered; to have, receive, and enjoy the personal estate and premises thereinbefore assigned unto the appellants, their executors, administrators, and assigns, absolutely (subject as to the policies of assurance to certain incumbrances thereon); provided always, and it was thereby declared that that deed was made by way of mortgage for securing the payment by the bankrupt, his heirs,

executors, or administrators, unto the appellants and the survivor of them, his executors or administrators, or their or his assigns, of the sum of 777*l.* 14*s.* 9*d.* sterling, with interest for the same from the day of the date of the deed until payment thereof at the rate of 5*l.* per cent per annum, together with the costs, charges, and expenses of proposing, preparing, engrossing, and executing that security and incident thereto. And the bankrupt thereby appointed the appellants his attorneys, to sign, seal, and deliver, or otherwise make and perfect any conveyances, surrenders, assignments, appointments, or assurances of any hereditaments or \*other real estate or property which the bankrupt was \* 588 then enabled to appoint, bind, or affect, or all or any part of his estate and interest therein, either to the appellants or the survivor of them, or to a trustee or trustees for them, or him, or to a purchaser or purchasers thereof, or otherwise. And the appellants or the survivor of them, his executors or administrators, or their or his assigns, were thereby empowered at any time or times thereafter to collect and get in or sell all the personal estate, money, debts, and premises included in that security, or any part thereof, and to sell all or any of the real estates and premises included therein by auction or private contract, subject to any prior mortgage or incumbrance, or discharged therefrom, and either for ready money or credit, and upon such terms and conditions, and in such manner generally, as they should think fit, or otherwise realize and convert the same into money, and to buy in, or resell, or rescind, or vary any contract relating thereto, without being liable for any consequential loss.

On the 24th of December, 1851, the adjudication took place, and the validity of the above deed being disputed by the assignees, an arrangement was made between them and the appellants, according to which the credits assigned by this deed were collected and received by the official assignee, without prejudice to the rights of any of the parties, and it was further arranged that the rights of the parties with reference to the books and the debts should be submitted to the commissioner upon the petition of the trustees of the Barnstaple and Chafford Benefit Building Society, or such other officers of the society as they might be advised, with right of appeal in the usual way.

In pursuance of this arrangement, the appellants \*pre- \* 589 sented a petition to the Court of Bankruptcy, submitting to

the jurisdiction of that Court, and praying that the sum of 413*l.* 3*s.* 2*d.* remaining in the hands of the official assignee, might be forthwith paid to the appellants, as trustees of the Barnstaple and Chafford Benefit Building Society, in satisfaction, so far as the same would extend, of the debt due and owing to them.

The bankrupt was examined before the commissioner, and the substance of his evidence was as follows:—

On the evening of the 20th of December, 1851, he owed above 5500*l.* to unsecured creditors. He also owed to secured creditors 2689*l.*, including the appellants. The property held by them was valued at 1656*l.* His stock in trade in the shop on that day amounted to above 400*l.*, and consisted of general grocery. He had also some farming stock at the same time worth 500*l.* He owed the Crown 211*l.* for duties. The whole of the farming stock was exhausted in paying an extent. He had some property on the 20th of December in a brick-yard, consisting of bricks and tiles of the value of about 40*l.*, but which produced about 22*l.* The sheriff came in on the Monday morning about eleven o'clock; but at the time when the witness executed the deed on the 20th of December, he had not reason to believe that executions were likely to be issued against his property. He had had writs issued against him before that time for debts which he had paid, and there were no writs out against him, as he believed. He almost doubted whether, if the executions had not come in, he should have been unable to carry on his business as usual. He had kept an average stock of about 400*l.* for the twelve months previous to his bankruptcy. His stock upon the 20th of December was not so \* 540 large, because \* it was ordinarily not so large at the end of the year.

The effect of the other evidence in the case appears sufficiently from the judgments.

*Mr. Swanston, Mr. T. H. Terrell, and Mr. Willes*, in support of the appeal. — As this deed did not assign the whole of the trader's property, it is not void, unless it was shown to be voluntary, and executed with a fraudulent intent. Now, the evidence shows that the deed was not voluntary, but was executed under actual and *bond fide* pressure, and it is not necessary that a creditor should have the power of making his threat effectual, in order to prevent a delivery or assignment from being voluntary. *Van Casteel v.*

*Booker*, (a) *Ogden v. Stone*, (b) *Carr v. Burdiss*, (c) *Brown v. Kempton*, (d) *Aldred v. Constable*, (e) *Mogg v. Baker*. (g)

[The Lord Justice KNIGHT BRUCE referred to *Morgan v. Brundrett*. (h)]

Moreover, it has never been decided that an assignment of *choses in action* in general can be an act of bankruptcy. *Ex parte Simpson*, (i) and the case of *Cumming v. Bailey*, (k) there referred to, were both cases of negotiable instruments.

*Mr. Rolt* and *Mr. Bagley*, for the respondents. — The assignment comprised, in fact, all the bankrupt's \*prop- \*541 erty; for all that was not included in that deed had been taken in execution to satisfy debts of much greater amount than it was worth. The bankrupt states that he was unaware of the execution having issued; but that is immaterial, for he was aware of the judgments having been entered up, and that execution might issue upon them at any moment. Moreover, the assignment was such as at once to reduce the bankrupt to insolvency, and to put it out of his power to continue his trade; for how could he have continued to trade after he had parted with his books? This is sufficient of itself to avoid the deed. *Dutton v. Morrison*, (l) *Stewart v. Moody*, (m) *Robertson v. Liddell*, (n) *Porter v. Walker*, (o) *Cook v. Rogers*. (p)

They also referred to *Ex parte Fleet*, (q) *Lucas v. Nockells*, (r) *Spottiswoode v. Stockdale*. (s)

(a) 2 Exch. 691.

(b) 11 M. & W. 494.

(c) 1 C. M. & R. 443.

(d) 19 Law J., N. S. (C. P.), 159.

(e) 4 Q. B. 674.

(g) 4 M. & W. 348.

(k) 5 B. & Ad. 289.

(p) 7 Bing. 438. Before the commissioner the following cases were also mentioned: *Samuel v. Duke*, 3 M. & W. 622; *Woodland v. Fuller*, 11 A. & E. 859; *Siebert v. Spooner*, 1 M. & W. 714; *Bannatyne v. Leader*, 10 Sim. 350. The commissioner referred to *Worsley v. De Mattos*, Burr. 467; *Assignees of Gascoyne v. Watts*, Doug. 86; *Hassells v. Simpson*, *Ib.* 89 n.; *Chase v. Goble*, 2 Man. & Gr. 930; *Young v. Ward*, 8 Exch. 221; *Hutton v. Cruttwell*, 1 Ell. & Bl. 15. See also *Ex parte Sparrow*, 2 De G., M. & G. 907; *Graham v. Chapman*, 12 C. B. 85; *Smith v. Caunan*, 2 Ell. & Bl. 35.

(q) 4 De G. & S. 52. (r) 10 Bing. 157. (s) Sir G. Coop. 102.

*Mr. Swanston*, in reply, referred to what was said by Lord ELDON in *Ex parte Bourne*. (a)

[THE LORD JUSTICE KNIGHT BRUCE. — Is there any case \* 542 in which an assignment of all a trader's credits \* and his books has been held not to be an act of bankruptcy ?]

There is no case deciding that it is. From *Carr v. Burdis*, (b) and *Lindon v. Sharp*, (c) the contrary may be inferred. If the executions had been out of the case, there would have been no pretence for saying that the deed was invalid. But surely its validity cannot depend upon the act of a person other than the debtor, or upon how much the sheriff might take or leave under the execution.

May 6.

THE LORD JUSTICE KNIGHT BRUCE. — The question in this case is as to the validity or invalidity of a deed of mortgage or security executed by the bankrupt in favour of certain creditors, the appellants, very shortly before the petition for adjudication, — I mean the validity or invalidity of the deed as against the respondents, the assignees under the bankruptcy. With the doctrine, however, of "fraudulent preference," at least in the ordinary, that is to say, the technical sense of that expression, we have nothing to do, for the transaction was not of the bankrupt's seeking: the deed was obtained from him under a degree of pressure on the part of the creditors who obtained it, and was his unwilling rather than his willing act; a state of things well consistent, nevertheless, with the possibility that the deed may have been an act of bankruptcy within the meaning of the 67th section of the Act of Parliament, called "The Bankrupt Law Consolidation Act, 1849," or may be void against the respondents as contrary to the policy of that Act.

\* 543 \* The deed was executed by the bankrupt between eight and nine o'clock in the evening of Saturday the 20th of December, 1851. The petition for adjudication was presented on the 23d, and the adjudication took place on the 24th, of that month. The adjudication, however, does not depend for its validity on the question whether the deed is valid or invalid against the

(a) 16 Ves. 148.

(b) 1 C. M. & R. 443.

(c) 6 Man. & Gr. 895; 7 Scott, N. S. 730.

respondents. It is clear that when the bankrupt executed it he was to his most certain knowledge deeply insolvent, and he was then subject to two judgments on which executions had that day issued and were put in force by the sheriff against his stock and furniture on the 22d. The deed was prepared by Mr. Woodard, who in and throughout the transaction acted for the appellants as their solicitor. Mr. Woodard had previously and down to the 18th or 19th of the same December, if not later, been the bankrupt's solicitor, and must upon the evidence be taken to have prepared the instrument with a general if not a particular knowledge of the insolvent state of the bankrupt's affairs, and at least some grounds for reasonably suspecting them to be desperate. Mr. Woodard was a plaintiff in one of the judgments, was attorney for the plaintiff in the other, and, having directed the issuing of the executions, obtained the deed, knowing or expecting at the time that the executions would be put in force on the morning of the following Monday, and that the effect of them and of the deed, or of the deed alone, must be forthwith to stop the bankrupt's trade and complete and publish his ruin.

It is plain from the nature of the deed, the value and circumstances of his property, and the amount of the debts due from him, that if the executions had been put in force on the morning of the 20th, as they were on the 22d, and the bankrupt had executed the deed with knowledge of that circumstance, the deed would have \* been void against the assignees under the bankruptcy \* 544 as comprising substantially all his available property, and as inconsistent with the continuance of his trade. It is said, however, and very possibly with truth, that when he executed the deed he was not aware that either of the executions had issued. Considering the particular nature of it, and the circumstances, I think that this makes no difference, especially as he must at the time have been aware of Mr. Woodard's connection with the judgments, and aware therefore how highly probable if not certain it was that knowing what Mr. Woodard did he would not delay enforcing them by execution.

The deed is thus : — [His Lordship read it.]

Substantially the only property of any value comprised in this instrument were the policies and debts, and the bankrupt's only property not comprised in it were the furniture and stock in trade seized under the executions, the whole of which together cannot

be and could not have been fairly considered as more than sufficient to answer the sums for which the executions issued and the costs attendant on those processes. The bankrupt's books were, as the evidence satisfies me, delivered to the appellants' solicitor on the 20th for the purpose of enabling him to ascertain who the debtors were and give them notice of the assignment, in which indeed the books are by express words included.

It appears to me that these acts of the bankrupt were inconsistent with the rational possibility of a continuance of his trade after that day, and must at the time have been known by him and by Mr. Woodard to be so, whether the bankrupt was at the time aware or ignorant of the actual issuing of the executions. How with all his debts assigned, with nothing, or with his furniture and \* 545 stock \* in trade only left, and his books given up, was it practicable or could he or Mr. Woodard have thought it practicable for him to go on ?

Being, as I am, of opinion that the deed and the delivery of the books were part of one and the same transaction ; being, as I am, of opinion that when the bankrupt put his hand to the instrument, they both knew that all chance of his resuming trade or continuing in trade fairly or substantially, or otherwise than colourably, was by that act destroyed, considering the well-known decisions that preceded, *Porter v. Walker*, (a) and *Lindon v. Sharpe* ; (b) and considering also those two cases, — I am satisfied that to hold this deed void against the respondents, as assignees under the bankruptcy, is not only right morally between the particular parties to the present controversy, is not only for the general interest of society, but is warranted by authority and correct in point of law.

The appeal fails, and the appellants must pay the costs of it.

THE LORD JUSTICE TURNER. — I am also of opinion that the deed in question is void. Two points were relied upon in support of the deed, — first, that considerable parts of the estate of the bankrupt, his stock in trade and furniture, and some other of his effects were not affected by the deed ; and, secondly, that there was no proof of the intent to defeat or delay the creditors.

As to the first point it was, of course, admitted that, if \* 546 all the estate of the bankrupt had been comprised in \* the deed, it would have been void ; but it was argued that a

(a) 1 Man. & Gr. 686. (b) 6 Man. & Gr. 895 ; 1 Scott, N. S. 730.

substantial part of the bankrupt's estate not being comprised in the deed, the case did not fall within the principle of the decisions as to assignments of the entire estate. I apprehend, however, that the true question in these cases is, whether there is such an assignment as prevents the trade being carried on; and I agree with the learned commissioner that carrying on trade means carrying it on in the usual and ordinary course. This was the doctrine of Lord MANSFIELD in *Hooper v. Smith*, (a) where he says: "Indeed, if a man makes over so much of his stock in trade, as to disable himself from being a trader, this would be fraudulent. It would be, as I said in *Compton v. Bedford*, (b) an assignment of his solvency. An assignment of all his household goods would be the same; for a man can't go on without them." This doctrine might possibly now be considered as going too far; but it shows the principle on which the cases proceed. One reason why an assignment of the entire estate constitutes an act of bankruptcy is because the bankrupt is thereby prevented from carrying on trade, and this reason must equally apply if the assignment be such as to prevent the trade being carried on. Now this bankrupt has assigned all debts and all bills of exchange and promissory notes, and all books of account in which such debts or sums of money are entered; and it is, I think, impossible to say that trade can be carried on in the usual and ordinary course without the books of account evidencing the debts which have been contracted in carrying on the trade. I think, therefore, the deed cannot be supported upon the first ground.

With respect to the second point, I think it impossible to doubt that under the circumstances of this case the \*inten- \* 547  
tion to defeat or delay the creditors must be imputed to the bankrupt.

It was ingeniously attempted, in the reply, to support both the points, upon the ground that the bankrupt had no knowledge of the intention to issue the executions; but in my opinion, this attempt fails as to the first point, because there was such an assignment as to prevent the trade being carried on, and as to the second point, because the circumstances of the case without reference to the assignment are abundantly sufficient to establish the intention of the bankrupt.

(a) 1 Wm. B. 442.

(b) *Ib.* 362.



*Ex parte* THOMAS HODGSON.

In the Matter of THOMAS HODGSON, a Bankrupt.

1853. June 10, 11. Before the LORDS JUSTICES.

A trader, who was not engaged in any business, except as the owner of two small sailing vessels, kept no regular accounts.<sup>1</sup> He contracted with a ship-builder for the repair of one of the vessels, and the amount claimed for the repair was far beyond the contract price, by reason of some alterations alleged to be beyond the contract. Cross actions were brought, and settled by arbitration. The trader left England in a feeling of irritation at the result of the proceedings, and was declared bankrupt on the petition of the ship-builder. He had on a former occasion compounded with his creditors, paying them less than 15s. in the pound, but had been forced into this proceeding by misfortune: *Held*, that the bankrupt's conduct in quitting England was highly censurable, but would be sufficiently punished by suspending his certificate for twelve months, and allowing it as one of the second class.

Under the present Act the Court will not universally refuse a certificate protecting the bankrupt's property, merely because he has on a former occasion compounded with his creditors, and paid less than 15s. in the pound.

THIS was the petition of the bankrupt, appealing from the decision of the commissioner giving to the appellant only a certificate of the third class, with the condition that such certificate should not protect his after-acquired property as against the debts which he then owed.

\* 548     \* The petition, and the affidavit of the bankrupt in support of it, stated in substance as follows:—

In September, 1851, the bankrupt carried on business at Hull as a ship-owner, but only had two small vessels called the *City of Lichfield* and the *Faugh-a-Ballagh*, and carried on no other business. He was possessed of a capital which amounted (as appeared by his balance-sheet) to 2475*l.* 2*s.* 2*d.* The bankrupt's mode of carrying on his business was by cash payments; and at the time aforesaid, besides a sum of 500*l.* and a sum of 300*l.*, both of which sums were secured upon mortgage, and both of which were duly deducted in the aforesaid estimate of the bankrupt's capital, he did not owe more than 150*l.*

In September, 1851, the bankrupt laid the vessel *Faugh-a-Bal-*

<sup>1</sup> See *Ex parte* Martyn, 2 De G., M. & G. 226, note (1) and cases.

lagh upon the ship-yard of Mr. George Kell, a small ship-builder at Barton-upon-Humber, for some trifling repairs and alterations (the vessel being at that time, exclusive of her stores, worth about 400*l*.)

Shortly after the vessel had been laid up, the bankrupt altered his original intention (by the advice, as he alleged, of Mr. Kell), and determined to have the vessel lengthened and widened and heightened.

A written contract, dated the 20th of September aforesaid, was accordingly prepared and executed by Mr. Kell and the bankrupt whereby it was stipulated that the vessel should be lengthened, widened, and heightened, repaired and improved in the way thereby specified, for 300*l*., which was to be paid by the bankrupt to Mr. Kell on the completion of the work.

The bankrupt alleged that Mr. Kell violated his part \* of the contract in not completing the alterations in the \* 549 vessel according to the agreement.

Mr. Kell, on the other hand, brought a cross action against the bankrupt, claiming in respect of the contract and extra work and alterations ordered by the bankrupt, and not included in the contract, 1409*l*. 13*s*. 3*¼d*.

These actions, and an action of trover, brought by the appellant to recover the ship, were all referred to arbitration; and on the 28th of July, 1852, the arbitrator being of opinion that the nature of the alterations had thrown open the contract, awarded to Mr. Kell the whole amount of his claim, less the sum of 79*l*. 5*s*. 1*½d*.

When the bankrupt received notice of the arbitrator's award, he had only between 200*l*. and 300*l*. left, and, being unable to pay the amount of debt and costs awarded against him, left England in the middle of the month of August, to avoid being arrested, having first executed a general power of attorney to his solicitor to act for him in his absence, and did not return till the early part of February, 1853.

On the 2d of February, 1853, Mr. Kell filed his petition in the Court of Bankruptcy, and the bankrupt was thereupon adjudicated a bankrupt on the 16th of the same month.

The certificate was opposed by Mr. Kell, but by no other creditor. The grounds of opposition were, that the bankrupt had been guilty of a fraudulent preference in mortgaging his property to a Mr. Wells; that he had kept no books; that he had compounded

with his creditors about seven years since; and that he  
 \* 550 had incurred \* unnecessary expenses in travelling and remaining on the Continent.

With respect to the charge against the bankrupt of having given a fraudulent preference to Mr. Wells, the bankrupt deposed that when he executed the securities in question, he not only did not contemplate bankruptcy or insolvency, or intend to diminish the sum to be divided among his creditors, but sincerely believed that, with the exception of his debt to the mortgagees, he did not owe 150*l.* in the world, not having the least expectation that the litigation in which he was engaged with Mr. Kell could or would terminate in the way it did, but being, as he alleged, advised that his contest with Mr. Kell would end in the bankrupt's recovering a balance from him.

With regard to the circumstance of no books having been kept, the bankrupt deposed that he, being in no way of business except as aforesaid, was in the habit of paying ready money for every thing, and besides his mortgages, including those to Mr. Wells and the claim of Mr. Kell, did not owe any debts at all, save trifling debts, amounting altogether at the utmost to not more than 150*l.*

With regard to the fact of his having left England, and incurring expenses on the Continent, the bankrupt admitted that the course he took was imprudent with reference to his own interests, but stated that, at that time, he did not suppose he was likely to become bankrupt; and that when he went and was remaining abroad, he was suffering deep mortification and distress at the result of the arbitrator's award, and was under a firm belief (which he still entertained) that the arbitrator had been misled by the evidence.

\* 551 \* With regard to the circumstance of the bankrupt having at a former period compounded with his creditors, he deposed that the facts were as follows: In February, 1843, he commenced business, and the Tartar was the first vessel he purchased. Her career was very brief and peculiarly disastrous. The first voyage which she attempted was to Archangel, and on her homeward voyage from that port to Hull, with a valuable cargo on board (part of which belonged to the bankrupt, and which cargo from some mistake was not insured), the vessel was dismantled and abandoned. The value of the ship and freight, and

of that portion of the cargo belonging to the bankrupt, was upwards of 1500*l*. The ship was insured with the General Marine Insurance Company for 1000*l*. That office disputed the abandonment, and the bankrupt, dreading the risks of engaging in a legal contest with so wealthy an office, accepted 500*l*., offered to him in full of all demands. He consequently lost full 1000*l*., which was nearly half his capital, by his first adventure in shipping.

In 1844 the bankrupt purchased a schooner named the Prince of Saxe-Coburg. This vessel he repaired and refitted at a very considerable outlay; but during the single voyage which she made whilst she belonged to the bankrupt, four accidents happened to her, and the loss arising therefrom was considerable. This so discomfited the bankrupt, that he determined to sell the schooner, and did so at a price very much below what he gave, and he thereby lost several hundred pounds by this vessel. In 1845 and early in 1846 the bankrupt made some purchases of tallow, linseed, clover seed, and linseed cakes; and after the purchase the goods fell greatly in value, in consequence of the panic in the money market which occurred at that time; and, under the circumstances aforesaid, the bankrupt was obliged to call \* his \* 552 creditors together in March, 1846, and they knowing well how exceedingly unfortunate the bankrupt had been, most handsomely, and without an exception, accepted a composition of 5*s*. in the pound. The bankrupt borrowed the money required for making the payment; but, at the end of 1846, the bankrupt came into possession of a little property, upon the death of a near relative, and he then forthwith repaid the money borrowed.

*Mr. Rolt* and *Mr. Kinglake* supported the appeal.

*Mr. Bacon*, for *Mr. Kell*, submitted that the decision of the commissioner was not more severe than the justice of the case required. He cited *Ex parte Hollingworth*, (a) and contended that on the authority of that case, and the principle on which the 6 Geo. 4, c. 16, § 127, was framed, the certificate ought not to do more than protect the person of the bankrupt.

*Mr. Keller* appeared for the assignees.

(a) 4 De G. & S. 44.

Mr. Wells was examined *viva voce* as to his security.

THE LORD JUSTICE KNIGHT BRUCE. — In the particular circumstances before us I find it difficult or impossible to understand why it was that Mr. Kell, the petitioning creditor, caused the bankrupt to be made a bankrupt unless it was merely with the view of punishing him for misconduct, actual or supposed, towards that gentleman. Substantially there are not, nor was it likely that there would be, any assets. So that if the bankruptcy had been directly or indirectly of the bankrupt's own obtaining \* 553 or seeking (which certainly \* it was not), he might have been open to more censure than that to which he is in the actual circumstances open. The bankruptcy is and from the beginning has been one altogether adverse to him. But as to his certificate, he was not before the learned commissioner, nor is he now, opposed except by Mr. Kell and the two assignees, — of whom neither is a creditor, — one being of course the official assignee, and the other having been nominated and chosen by Mr. Kell, who either would not or could not be appointed an assignee himself, but has proved a debt under the bankruptcy, not, however, so much in the whole as 80*l.*, though he claims, and probably with truth, to be a creditor of the bankrupt to an amount much larger. Mr. Kell holds or claims to have a security or lien upon certain property in his possession that (subject to his security or lien, if any, and to another security which seems alone enough to exhaust the value) belongs to the bankrupt's estate. The total amount of debts proved under the bankruptcy is less than 100*l.*, including what Mr. Kell has proved.

These considerations and the original examination before us have reduced the case against the bankrupt as to his certificate to three points, — first, his want of business-like habits, and seemingly of capacity for business; secondly, the absence of books and accounts, a head which may perhaps be hardly distinguishable from the first; and, thirdly, his conduct in going and living for five or six months abroad, where and as he did, after he had become aware of the nature of Mr. TEMPLE'S award.

With regard to the first point, the errors and mishaps which have thus arisen have not been of such a nature as to lead to an inference of moral delinquency or to be otherwise than usual. It is probable that all who dealt with him were well aware of the

degree of his aptitude \* and capacity. The second point \* 554 certainly deserved close attention and required explanation. But I think that the particular and limited nature and character of the bankrupt's business, including of course the manner in which he seems to have employed his vessels, afford, if not a justification, some excuse in this respect, so as not to render it incumbent on us, with reference either to the specific merits of the individual case or to the interests of society, to visit his mode of acting so far with great severity.<sup>1</sup> On the third point, however, I regard his conduct as open to much animadversion. He ought not to have gone abroad when and as he did. He ought not to have lived abroad at the rate of expense or in the manner that he did.

His proceedings have been censurable, but considering the whole of the facts before us I am of opinion, and I believe my learned brother also to think, that the demands of public and private justice here will be satisfied by suspending the certificate for a twelve-month from the date of the petition for adjudication, by allowing it then of the second class without restriction or condition, and by granting the bankrupt protection as from the 11th of July next, but not during the intermediate time.

THE LORD JUSTICE TURNER. — I feel no doubt that some punishment is deserved by this bankrupt: the question is, what extent of punishment will satisfy justice. The effect of the judgment of the commissioner is to deprive the bankrupt of the power of entering into trade until he has paid all the debts which could be proved under the bankruptcy. I do not consider it to be in general consistent with good policy to allow a bankrupt to enter into trade, protecting his person, and leaving all his estate subject to be swept away under an execution issued by any creditor to whom \* he was indebted before his bankruptcy. Extreme \* 555 cases may occur in which justice may require such a course to be taken; but it does not appear to me consistent with sound policy generally to grant certificates in such a form. With regard to the conduct of the bankrupt towards Mr. Kell, I feel no doubt that there was a *bond fide* belief on the part of the bankrupt that he was not indebted to Kell in the amount claimed. It is, however, said that the bankrupt made a composition with his creditors

<sup>1</sup> See *Ex parte Martyn*, 2 De G., M. & G. 226, note (1) and cases.

five years ago, and that this circumstance disentitles him to a certificate which will do more than protect his person. It appears to me, however, that the composition was rendered necessary by misfortune. It has been argued, on behalf of the respondent, that the certificate, in such a case, ought not to protect the bankrupt's property, by analogy to the provision in the Act of George 4, that where a bankrupt had compounded with his creditors, and had paid less than 15s. in the pound, his future assets were not to be discharged. I think, however, that this argument rather tends the other way, and that, from the omission of a similar provision in the present Act, we may infer that the legislature considered such a punishment too severe to be inflicted in every such case.

Another charge made against the bankrupt is founded on the absence of accounts, but it is to be considered that this bankrupt was a ship-owner, having only two small vessels, and was not a trader in extensive business; and that the same importance does not attach to the absence of books in such a case as on one of general trading.<sup>1</sup> His absence abroad is perhaps the least justifiable part of his conduct; but I think that it is rather to be attributed to angry feelings than to any settled principle of dishonesty.

\* 556 Although it cannot be justified, I think it is \* not sufficient ground for subjecting all his future property to his past debts. Upon the whole, it appears to me, that the measure of justice awarded by my learned brother is the right one.

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*Ex parte* NEILSON.

In the Matter of W. EDMOND and T. EDMOND, Bankrupts.

1853. December 12, 13, 15. Before the Lord Chancellor Lord CRANWORTH and the Lord Justice TURNER. (a)

An allottee of shares in a completely registered joint-stock company, but who has not executed the deed of settlement of the company cannot under the provisions of the 26th section of the Joint-stock Companies Registration Act (7 & 8 Vict. c. 110) enter into a contract for the sale of his shares.<sup>2</sup>

(a) The Lord Justice KNIGHT BRUCE was absent from indisposition.

<sup>1</sup> See *Ex parte Martyn*, 2 De G., M. & G. 226 note (1).

<sup>2</sup> See 1 Lindley Partn. (Eng. ed. 1860) 131. The statute is now repealed,

W. E. was the allottee of shares in a completely registered joint-stock company, but had not executed the deed of settlement: his brother T. E., acting under the authority of a power of attorney, desired Messrs. N., stock-brokers, to sell these shares, and they entered into contracts with purchasers accordingly: before the transfers were registered W. E. became bankrupt, and the brokers were obliged at their own cost to complete the contracts with the purchasers. *Held*, dismissing a petition by the brokers claiming to have the bankrupt's shares transferred to them, that, under the terms of the 26th section of the Act 7 & 8 Vict. c. 110, the contracts were null and void,<sup>1</sup> and that the assignees of the bankrupt were entitled to the shares as part of his estate and effects.<sup>2</sup>

THIS case, which was substantially an appeal from a decision in bankruptcy of Mr. Commissioner SKIRROW, came on before the Court of Appeal under the following circumstances:—

In June, 1845, a prospectus was issued for the formation of a joint-stock insurance company at Liverpool under the title of the Royal Insurance Company, with a capital of two millions in one hundred thousand shares of twenty pounds each; and on the 13th June, 1845, the company was completely registered in pursuance of the Act 7 & 8 Vict. c. 110.

\* On the 7th July, 1845, the bankrupt, William Edmond, \* 557 who, together with his brother Thomas Edmond, carried on business as a merchant at Bombay and Liverpool, applied by letter for two hundred shares in the company; and in consequence of this application two hundred shares were, on the 22d July, 1845, allotted to him at fifteen shillings per share premium, and the usual letter of allotment was forwarded to him by the manager of the company. On the 28th July, 1845, W. Edmond paid the premium of fifteen shillings per share, together with the first call of twenty shillings per share on the shares allotted to him, and took a receipt for the payment written across the letter of allotment.

On the 3d December, 1845, W. Edmond left Liverpool and went to Bombay for business purposes, not having executed the deed of settlement of the company. Shortly before his departure, he executed a letter of attorney, dated the 20th November, 1845, authorizing his brother Thomas Edmond to ask, demand, &c., all

except as to insurance companies, and the prohibition never extended to railway or other companies requiring the authority of Parliament, *ib.* 599.

<sup>1</sup> See *Bunn's Case*, 2 De G., F. & J. 275.

<sup>2</sup> See *Penny v. Pickwick*, 16 Beav. 246; *Graham v. Van Diemen's Land Co.*, 11 Exch. 100.



and every manner of debt and debts, &c., "railway shares or stock consolidated or in scrip" owing or belonging to him (W. Edmond), &c., and to give receipts for the same, and to settle accounts, bring and defend actions, &c., and also authorizing T. Edmond for him, W. Edmond, and in his name "to make, sign, seal, execute, and deliver any transfer or assignment," or to join in transferring or assigning any mortgage, &c., or other specialty of whatsoever kind and nature, and likewise to take possession of all goods and chattels of W. Edmond, and "to treat with any person or persons whatsoever for the selling or disposition of all or any part or parts of the said goods and chattels" and all his estate, right, &c., in and to the same premises, and generally to do, &c., all other lawful acts and things necessary to be done therein, and all acts and things whatsoever requisite to be  
 \* 558 done respecting all and every \* his affairs and concerns, and in or about the same, nothing excepted.

On the 9th December, 1845, Thomas Edmond, acting on the letter of attorney, paid a further call of one pound per share on the two hundred shares and took a receipt for the same, and proposed to execute the deed of settlement of the company; but the solicitor of the company considered that the letter of attorney did not confer authority on Thomas Edmond to execute the deed, and in consequence the deed of settlement remained unsigned by W. Edmond or any one for him.

In the month of January, 1846, Thomas Edmond directed Messrs. Neilson, share-brokers at Liverpool, to sell the two hundred shares; and in accordance with this direction Messrs. Neilson negotiated sales of one hundred and fifty-five shares in different portions to three distinct parties, and notice of the sales was duly given to the secretary of the company, and they were assented to by the company, and transfers were prepared and executed by Thomas Edmond as the attorney of his brother for carrying the sales into effect. The company's solicitor, however, was of opinion that before the transfers could be registered the company's deed should be executed by W. Edmond, and in consequence of this the registration of the transfers was postponed.

On the 6th March, 1846, W. Edmond and T. Edmond became bankrupts. The transfer of the one hundred and fifty-five shares not having been completed as above mentioned, Messrs. Neilson, according to the rules and regulations of the Liverpool Stock Ex-

change, became bound to deliver the number of shares agreed to be sold to the respective purchasers thereof, and they duly transferred and delivered shares accordingly.

\* Under these circumstances Messrs. Neilson claimed to \* 559 stand in the place of the original purchasers, and to be entitled to have the one hundred and fifty-five shares in question transferred to them. The assignees of W. Edmond having refused to do what was requisite for completing the transfers, Messrs. Neilson presented a petition in the bankruptcy, praying that the assignees might be directed to execute the transfer of the shares, and that the petitioners might be entitled to all benefit and advantage of such transfer. Mr. Commissioner SKIRROW dismissed this petition, holding that the sales were void, and that the assignees were entitled to the shares as part of the bankrupt's estate, William Edmond not having been a duly constituted shareholder pursuant to the 26th section of the Act 7 & 8 Vict. c. 110. (a)

\* From this decision Messrs. Neilson appealed, and the \* 560

(a) The following contains the material portions of the judgment.

After stating the principal allegations in the petition, the learned commissioner said: "I will now consider whether or no in point of law the shares in question were in the order and disposition of the bankrupt at the time of his bankruptcy. In the first place, the petitioners allege that they sold the shares by virtue of the power of attorney given by W. Edmond to his brother; if, then, this power of attorney did not confer a legal right on Thomas Edmond, it follows that he could not sell the shares, and it was the duty of the petitioners, who were acting not only for the seller, but also on behalf of the buyer, to see that the power authorized the sale. It is quite clear that they had notice of all the circumstances relating to the power, for they were aware that long before the shares were asked to be transferred the power of attorney had been held, in the opinion of the legal adviser of the company, to be inoperative for the purpose of giving a legal title to T. Edmond to dispose of the shares; they cannot therefore complain at now finding this opinion to be well founded. If a man sells an estate as an authorized agent, and is empowered to sell it for a given sum of money, but, instead of selling it for that sum, sells it for a different sum, the buyer of the estate cannot enforce the contract: if he was to file a bill for specific performance, it would be immediately dismissed, because it was his duty to see that the authority given was strictly complied with. There is another circumstance to be noticed: the bankrupt was at the time merely a subscriber, he was not a shareholder at all. Of this there is conclusive evidence, for on the second receipt given the words 'not transferable,' were written, which in common interpretation would mean, not transferable till the party had conformed with what he was by law required to do. In the previous year, 1844, an Act of Parliament (7 & 8 Vict. c. 110) had been passed, principally for the purpose of putting a stop to persons dealing in visionary schemes, bringing ruin on themselves, and having a

case came before the Vice-Chancellor KNIGHT BRUCE \* 561 \* sitting in bankruptcy on the 2d August, 1850, when his Honor determined that, if the petitioners desired it, a case should be sent for the opinion of a Court of Law; and the petitioners having so elected, a case was directed accordingly.

Nothing having been effectually done by the petitioners to get

demoralizing influence on others: that Act declared that unless a person had done certain things, which here William Edmond had not done, and which Thomas Edmond was not empowered to do, he was not in a situation to transfer his shares. It has been said, indeed, that, notwithstanding this, it is according to the rules of the stock exchange, and a common practice, to deal with shares in that way; but any rules must be altogether inoperative that interfere with the positive law of the land. What, then, are the provisions of the Act of Parliament? The third section points out what shall be meant by certain words: it says that a subscriber is 'any person who shall have agreed in writing to take, or have taken, any shares in a proposed company, or in a company formed, and who shall not have executed the deed of settlement, or a deed referring thereto;' William Edmond was exactly in that position: it then goes on to define what a shareholder is; he is 'any person entitled to a share in a company, and who has executed the deed of settlement, or a deed referring to it.' W. Edmond was not a shareholder, because he had not executed any deed of settlement. In the 26th section is laid down what is necessary to entitle a person to deal with shares; and I believe it is admitted on all sides that the section was introduced to prevent the mischief which was then going on, to the great injury of trade, and, as I before remarked, to the ruin of individuals, and the demoralization of society. The section enacts that, to entitle a subscriber to dispose by sale or mortgage of any shares or interest in a company, he must be duly registered as a shareholder. Looking, then, at the power of attorney, and looking at this Act of Parliament, it is clear that in point of law the persons who now claim under the power had no title, and that which they did was inoperative."

The learned commissioner then proceeded to consider whether the dealings between the parties constituted an equitable contract; and after observing that there was no evidence to bring home to the petitioners any knowledge of the embarrassed circumstances of W. Edmond, proceeded as follows: "Here there is no assignment of the shares, nor any notice of an assignment binding in law. There was, indeed, some sort of notice given to the company, but it did not state to whom the shares were sold, nor the authority under which they were sold; and the power of attorney gave no right whatever. When you speak of an assignment, you mean a legal instrument, but there is none such here. Again, the petitioners have no right to complain, for they had due notice given to them; they knew perfectly well, or they ought to have known, that the words 'not transferable' meant something; and they were cognizant also of the Act of Parliament. Being, then, of opinion that in point of law the property remained in the order and disposition of the bankrupt at the time of the bankruptcy, and being of opinion that there was no equitable contract whatever, I must dismiss the petition."

the case brought forward for decision, the assignees, who were anxious to wind up the bankrupt's estate, applied for and obtained leave from the Lords Justices to restore the petition to the paper, in order to have it reheard. This was done; but, on the matter being opened, their Lordships thought it desirable to have the appeal heard before the full Court, and the petition now came on accordingly.

The twenty-sixth section of the Joint-stock Companies \* Registration Act, 7 & 8 Vict. c. 110, on which the ques- \* 562 tion mainly turned, after certain enactments restricting the rights of shareholders prior to the execution of the deed of settlement, proceeds as follows: "And further, with regard to subscribers and every person entitled or claiming to be entitled to any share in any joint-stock company the formation of which shall be commenced after the first day of November, One thousand eight hundred and forty-four, that until such joint-stock company shall have obtained a certificate of complete registration, and until any such subscriber or person shall have been duly registered as a shareholder in the said registry office, it shall not be lawful for such person to dispose, by sale or mortgage, of such share, or of any interest therein, and that every contract for or sale or disposal of such share or interest shall be void, and that every person entering into such contract shall forfeit a sum not exceeding ten pounds."

*Mr. J. Russell* and *Mr. Eddis*, for the petitioners Messrs. Neilson. — There is in this case a clear contract binding in equity on the bankrupt, and the Court will therefore enforce it. The contention on the part of the assignees is, that the sale was void under the terms of the twenty-sixth section of the Act 7 & 8 Vict. c. 110; but, even if this were so, and it was necessary, in order to give validity to the sales of the shares, that the deed should have been executed by the bankrupt, the deed must, under the circumstances, be treated as having been executed, because that act was prevented solely by the mistake of the solicitor of the company, the power of attorney conferring ample authority on T. Edmond to execute for his brother. We insist, however, that the case does not fall within the Act, the policy of which was, in reference to joint-stock \* companies, to prevent persons dealing \* 563 with a species of property in which they possessed no title

binding as between them and the company. This state of things did not exist in the present instance: the bankrupt was equitable owner of the shares; every act necessary to be done had been done; and on the one hand the company could not deny the right of the bankrupt, and he on the other was bound to take shares. There is, besides, nothing in the Act to show that it is necessary for a mere allottee of shares to have his name registered, and the clause in the twenty-sixth section, which is relied on, applies only to those persons whose names are to be registered. [They read and commented on the seventh, eleventh, forty-ninth, fiftieth, and fifty-fourth sections of the statute, in connection with and as supporting the view taken by them of the meaning of the twenty-sixth section.]

*Mr. Bacon, Mr. Tomlinson, and Mr. Smythe*, for the assignees.— They contended that the intention of the statute in question was to lay down a general rule applicable to all cases, and to provide that a shareholder, in order to obtain a right to sell his share, must execute the deed of settlement of the company, and that until he had done so he could not part with any shares; that the bankrupt in the present instance had not done this; that, so far as the power of attorney was concerned, the solicitor of the company was quite right in the objection he had taken, and that it conferred no authority on T. Edmond to execute the deed. They submitted that the case came within the meaning of the Act, and that therefore the decision of the commissioner was right. On the point of the construction of the Act, they read and commented on the fourth, seventh, tenth, eleventh, twelfth, fifteenth, twenty-  
 \* 564 sixth, and forty-ninth sections, and referred to the \* judgment of ERLE, J., in *Wilkinson v. The Anglo-Californian Gold Mining Company*: (a) they also cited *Wilson v. The Birkenhead, Lancashire, and Cheshire Junction Railway Company*, (b) *The Galvanized Iron Company v. Westoby*, (c) *Young v. Smith*. (d) As to the construction of the letter of attorney, they referred to *Attwood v. Munnings*. (e) In reference to the nature of the contract, and the difference between a general and special contract as connected with the interference of the Court to enforce it, they cited *Austen v. Craven*, (g) *Hibblewhite v. M<sup>r</sup> Morine*, (h) *Knight v.*

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| (a) 21 Law J., Q. B. 327.             | (c) 8 Exch. 17.     | (e) 7 B. & C. 278. |
| (b) 6 Exch. 626.                      | (d) 15 M. & W. 121. | (g) 4 Taunt. 644.  |
| (h) 5 M. & W. 462; and 6 M. & W. 200. |                     |                    |

*Barber, (a) Dixon v. Yates, (b) Sutton v. Tatham, (c) Humble v. Mitchell, (d) Bayliffe v. Butterworth, (e) Wait v. Baker, (g) The Queen v. The Registrar of Joint-stock Companies. (h)*

*Mr. J. Russell* replied.

December 15.

THE LORD CHANCELLOR. — This case comes before us upon a petition which is substantially an appeal from an order of the commissioner. The petitioners (Messrs. Neilson) had acted as brokers in the sale of certain supposed shares belonging to the bankrupt. Having in this character contracted to sell the shares, it turned out that the shares were merely scrip, that is, contracts under which the bankrupt was entitled to become a shareholder: the consequence was that the petitioners were unable to carry their contract into effect, and were obliged at their own cost to purchase shares for the persons with whom they \* had con- \* 565 tracted. It appears that the bankrupt had in his hands at the time of his bankruptcy scrip that would enable him to become a shareholder to the extent of two hundred shares; and the object of Messrs Neilson is to assert a lien on that scrip, and either to compel the bankrupt's assignees to complete the title to these incipient shares by executing the company's deed, or in some way or other to make this scrip available for the repayment of the money expended by the petitioners in buying shares for the purchasers. This case was in the first instance heard before the commissioner, who was of opinion that Messrs. Neilson had no such claim as they sought to establish, and dismissed the petition: it now comes on by way of appeal before us.

A great deal of argument was addressed to us upon the different clauses of the Act; and, although I have since the hearing looked carefully through them, I have found nothing to vary the impression which I had from the first; namely, that this is not a case in which there is any difference between law and equity, and that the legislature meant to make it an imperative condition on any person before he could sell his shares or scrip or whatever it was in a

- (a) 16 M. & W. 66.
- (b) 5 B. & Ad. 313.
- (c) 10 A. & E. 27.
- (d) 11 A. & E. 205.

- (e) 1 Exch. 425.
- (g) 2 Exch. 1.
- (h) 10 Q. B. 839.

company to be formed, that he should constitute himself a complete shareholder by executing the deed of settlement and subjecting himself to the liabilities of that deed.

The argument pressed upon us as to some of the earlier clauses in the Act amounts to no more than this, that the legislature has not expressed its own intention with perfect accuracy, and that it has used the words "shareholder" and "subscriber" occasionally in terms not strictly appropriate. One way of getting out of the difficulty in all these cases might be, to hold that the interpretation clause only gives a particular meaning to be applied

\* 566 \* unless there be any thing in the context, as I think there is in the Act here in reference to the point before us, leading to a contrary interpretation. Whatever view, however, may be taken of that, I cannot help suspecting that the legislature has used the words in question in some instances incautiously; but that is of no consequence, for the latter branch of the twenty-sixth section, to which alone it appears to me we are to direct our attention, has no such ambiguity. The section, after some enactments as to shareholders, proceeds thus, using the word "subscriber:" — [His Lordship read the clause as above set out.] The terms here used clearly show that the legislature, wisely or unwisely, thought that the contracts and dealings referred to were injurious to the public interest; they therefore impose a penalty on any person who shall enter into them; and the consequence is that we must take it to be contrary to the policy of the statute itself that any such dealings shall take place.

There has recently been a great deal of discussion as to how far Courts of justice can act upon the notion of any particular contract being contrary to the policy of the law; but though there may be doubts in particular cases, the Courts will act, and no doubt must act, upon the policy of the law when that policy is distinctly enunciated in the statute which creates the disability or propounds that policy. The legislature, then, having said that it is contrary to public policy (for that is the meaning of imposing the penalty) that there shall be any dealing with these *choses in action* in that incipient state of existence, and having imposed a penalty on any person who shall so deal, goes on to say that any contract for such sale shall be null and void.<sup>1</sup> If the contract is null and void on

<sup>1</sup> See Chitty Contr. (10th Am. ed.) 767, 768, and cases in notes; White v. Buss, 3 Cush. 448, 450; Miller v. Post, 1 Allen, 434.

grounds of public policy, it must be null and void in law and equity for all purposes.

\* That being so, what is the position in which the Messrs. \* 567 Neilson stand? They have at the instance of the bankrupt, or those who represented him, entered into a contract to sell a portion of two hundred shares for the bankrupt. The bankrupt being unable to complete the contract, they were obliged to complete it themselves; and it now turns out that the bankrupt had no such shares, no such salable commodity, and that the Messrs. Neilson have been prevailed on improperly by the bankrupt, or those who represented him, to make the contract. The person who represented the bankrupt possibly thought that he had authority to do what he did; but he had no such authority. The consequence is that Messrs. Neilson have incurred a very serious loss, and I am sorry for that; but their remedy must be the same as that of any other person who has been misled. Whether they have a remedy by action for damages, or whether they may prove before the commissioner for so much money paid for the use of the bankrupt, we need not stop to inquire; but they can by no possibility have a better right on this scrip than the purchaser himself would have had, and the legislature says that the purchaser himself has no right at all. It appears to me that this concludes the whole question, and my opinion is that the petitioners can establish no right, and the petition must therefore be dismissed, and dismissed with costs.

THE LORD JUSTICE TURNER. — The principal question which was argued before us in this case, was, whether subscribers to a company falling within the provisions of 7 & 8 Vict. c. 110, to whom shares had been allotted after the complete registration of the company according to the provisions of the Act, could lawfully deal with those shares by way of sale or mortgage before they had executed the deed of settlement of the company, and had been duly registered \* as shareholders in the registry estab- \* 568 lished by the Act. This question mainly depends upon the construction of the 26th section of the Act, with reference of course to the interpretation clause.

That the word subscriber, as defined by the Act, would, if unlimited and uncontrolled, apply to an allottee of shares after complete registration, was hardly if at all disputed, and cannot indeed



be denied. The question therefore seems to be reduced to this, whether the unlimited meaning of the word subscriber, as defined, is excluded by the context or the nature of the subject-matter, and it does not appear to me that it is.

We must first consider the question on the words themselves. They are found in a clause which also contains provisions as to shareholders, and much was said at the bar as to the difficulty of putting a construction upon the word shareholders contained in the clause; but I do not think that any difficulty which there may be in that respect can affect the present question. The Act, from the interpretation clause downwards, distinguishes between shareholders and subscribers. The two parts of the clause therefore relate to two distinct subjects; and it would not, as I conceive, be consistent with any sound rule of construction, to permit any difficulty which there may be in construing an Act of Parliament as to one matter to throw doubt upon its construction as to another and distinct subject. On the contrary, I think it is the duty of the Courts so to construe Acts of Parliament as to carry them into effect with respect to all matters with respect to which their provisions are plain and intelligible, without reference to other provisions as to other matters which may be open to doubt and difficulty. In my opinion, therefore, any difficulty which there

\* 569 may be in the construction \* of the word shareholder, as used in the 26th section of the Act, must be laid aside, and the question must be decided upon that part of the section which applies to subscribers, and upon the other provisions of the Act.

The language of this part of the section is not, I think, unimportant. It treats the interests of subscribers who have not executed the deed as subsisting interests, and merely prohibits the dealing with them in the particular mode pointed out. It allows them to devolve, and to be the subject of testamentary disposition, but prohibits their being dealt with by sale or mortgage. The legislature, therefore, has not overlooked the existence of the interest, but, recognizing its existence, has limited the power of dealing with it. It is said, however, that this limitation ought not to be applied to any other parties than those who were subscribers at the time of complete registration. But the clause does not contain, nor can I find any thing in the context or nature of the subject which imports, such a limitation. Allottees are not the less subscribers, because the allotments are made to them after com-

plete registration; and so far from their being excluded by the context or nature of the subject, the Act seems to me to bear a directly contrary import. It seems to me to contemplate a continued series of registration, completing and perfecting that which at the time of complete registration might be imperfect and incomplete. I observed during the argument upon the tenth section as importing that there must be a return of any change in the subscribers after complete registration, and further consideration has confirmed me in that impression. By the seventh section, there might be complete registration when the deed was subscribed by one-fourth of the subscribers holding at the date of the deed one-fourth of the maximum number of shares in the capital.

\* Could it be intended that if the whole of the remaining \* 570 three-fourths was afterwards subscribed, there should be no registry of those subscribers? The effect might be that in such a case no more than one-fourth of the subscribers might ever be upon the registry, and the partners who had executed the deed would have no means of knowing who were their copartners.

It was said that the term subscribers in the twenty-sixth section ought not to be applied to allottees after complete registration, because they had no power to compel themselves to be put upon the registry; but there is no force in this argument, for such allottees might at any time execute the deed, and then compel registration.

My opinion, therefore, is that the allottee in this case was a subscriber within the meaning of the twenty-sixth section, and therefore could not lawfully deal with his shares until he had executed the deed, and consequently that this petition must be dismissed, and, as I think, dismissed with costs. The conclusion at which we have arrived seems to me to fall in with the whole scope and policy of the Act. Independently of other provisions, the Act has most carefully provided for the transfer by deed of the shares of shareholders, the parties who had executed the company's deed. It has made no such provision for transferring the shares of subscribers, which is strong to show that the legislature did not contemplate that such shares could be so transferred; and with respect to the policy of the Act, it is obvious from the enactments (to which, and not to our own views of the public good, we have to look on the question of policy) that the legislature saw that inconveniences had arisen from the subscribers to these large companies not being ascertained, and therefore meant to provide the means of ascertaining them.

\* 571

\* SURCOME *v.* PINNIGER;

And in the Matter of KING'S COLLEGE HOSPITAL  
ACT, 1851.

*Ex parte* PINNIGER.

1853. February 9. Before the LORDS JUSTICES.

A father, shortly before the marriage of his daughter, told her intended husband that he meant to give certain leasehold property to the couple on their marriage. After the marriage he gave up possession of the property to the husband, to whom he directed the tenants to pay the rents, and handed to the husband the title-deeds. The husband expended money upon the property: *Held*, sufficient part performance to take the case out of the Statute of Frauds.<sup>1</sup>

THIS was an appeal from the decision of Vice-Chancellor STUART, upon a petition presented under the Act incorporating King's College Hospital and in a cause.

By the Act the hospital was empowered to take land for the site of the building, subject to the provisions of the Lands Clauses Consolidation Act, 1845.

In the year 1843 Mr. George Chartres paid his addresses to Amelia Ann Aylwyn, the daughter of William Aylwyn, and made her an offer of marriage. On the 2d of January, 1844, Mr. Aylwyn told Mr. Chartres that he was entitled to a leasehold house and premises in Carey Street, Lincoln's-inn Fields, and intended to give this property to his daughter and Mr. Chartres, on their marriage.

In March, 1844, the marriage took place, and soon afterwards Mr. Aylwyn gave up possession of the house to Mr. Chartres, and directed the tenants to pay the rents to him. Mr. and Mrs. Chartres went to reside in the house, and Mr. Chartres expended a con-

<sup>1</sup> See 1 Lead. Cas. in Eq. (3d Am. ed.) 719 [625], 727, 728; *Warden v. Jones*, 2 De G. & J. 76; 23 Beav. 487; 26 L. J., N. S. Ch. 427; *Stoddardt v. Tuck*, 5 Md. 18; 1 Sugden V. & P. (7th Am. ed.) 140, 141, 162, and numerous American cases in notes; *Caton v. Caton*, L. R. 1 Ch. Ap. 137; 2 Story Eq. Jur. § 987 a; *Randall v. Morgan*, 5 H. L. Cas. 185; *Parkhurst v. Van Cortlandt*, 14 John. 15; *Moreland v. Lemasters*, 4 Blackf. 383, 385; *Byrd v. Odem*, 9 Ala. 756, 764; *France v. France*, 4 Halst. Ch. 650; *Campbell v. Ingilby*, 1 De G. & J. 393.

siderable sum of money in repairs. He received the rents of such parts as he did not occupy, and treated the house as his own. Mr. Aylwyn also delivered to Mr. Chartres the lease and other documents of title relating to the house.

On the 19th of December, 1849, Mr. Chartres wrote to Mr. Aylwyn thus: "I think I shall try Baswell and \* Roberts \* 572 again to buy the Carey Street lease (as it is worth more to them than to any one else), and get rid of it, as the money will be worth more to me;" to which Mr. Aylwyn replied: "As regards Carey Street, I wish you if possible to convert that into cash: as you observe, it will be more useful."

Mr. Aylwyn died intestate.

The hospital having taken the house under the powers of their Act, the question was, to whom the purchase-money belonged. Mr. Aylwyn's administrator claimed it by the petition now before the Court, but the Vice-Chancellor ordered it to be paid to Mr. Chartres. The administrator of Mr. Aylwyn appealed.

*Mr. Follett* and *Mr. Kinglake*, in support of the appeal.— Marriage is not a sufficient part performance to take a case out of the Statute of Frauds. *Dundas v. Dutens*, (a) *Lassence v. Tierney*. (b) Indeed, the Statute of Frauds expressly provides that a contract in consideration of marriage shall not be binding unless that contract be in writing. With regard to the other facts relied upon, the Court will not extend the exceptions to the Statute of Frauds beyond former decisions, those decisions having already gone too far. *Russell v. Russell*. (c) Moreover, the evidence does not show any contract, but merely a parol declaration of intention.

They also referred to *Spurgeon v. Collier*, (d) *Jefferys v. Jefferys*, (e) *Ellis v. Nimmo*, (g) *Edwards v. Jones*, (h) *Ex parte Haigh*, (i) and 2 Sugden on Powers, 250.

\* *Mr. W. M. James* appeared for a defendant in the \* 573 same interest.

(a) 1 Ves. Jr. 196; 2 Cox, 235.

(b) 1 M. & G. 551.

(c) 1 Bro. C. C. 269.

(d) 1 Eden, 54.

(e) Cr. & Ph. 138.

(g) L. & G. temp. Sugden, 333.

(h) 1 M. & Cr. 226.

(i) 11 Ves. 403.

*Mr. Russell*, for *Mr. Chartres*. — The Statute of Frauds did not render a parol agreement a nullity. In *Hammersley v. De Biel*, (a) it was held that a letter written after a marriage was sufficient evidence within the Statute of Frauds of an antenuptial agreement. All that was decided by *Lassence v. Tierney* was, that marriage alone was not sufficient part performance. But in the present case possession was delivered, which has been always held sufficient. The provisions of the Lands Clauses Consolidation Act, 1845, which are incorporated in the Hospital Act, throw the *onus* of proof upon those who impeach the title of the party in possession; and the latter, in the absence of proof to the contrary, is entitled to the compensation money.

*Mr. Follett* replied.

THE LORD JUSTICE KNIGHT BRUCE. — This case, in point of fact, upon the evidence, stands substantially thus: It seems that *Mr. George Chartres*, having proposed to marry the daughter of a gentleman of the name of *Aylwyn*, who was possessed of some leasehold property in *Carey Street*, *Mr. Aylwyn*, in the course of conversation in the presence of a third person, expressed to *Mr. Chartres* an intention to give to him and his intended wife the leasehold house in question in the event of the marriage taking place. I consider that promise to be proved by the evidence. The marriage took place; but as no writing passed, it is probably true that if the case had rested there the promise would have  
 \* 574 been ineffectual, and, however binding in point of \* honour and morality the promise might have been, it would not have been so at law or in equity. Some time after the marriage, however, the father gave up possession of the property to the son-in-law; and it must upon the evidence be taken that he so gave up possession by reason and in performance of the verbal agreement entered into before the marriage. The son-in-law entered into possession and expended money on the property, and was never disturbed, but was allowed to treat it as his own. When the father-in-law dies the administrator says that all this is to go for nothing, and that the property still formed part of his estate. I am of opinion that the administrator cannot be heard to say that. I am of opinion

(a) 12 Cl. & Fin. 45.

that this is a clear case of a parol agreement for valuable consideration which had been in part performed, and it is the settled law of this country, and has been so for a great number of years, that in such circumstances the Statute of Frauds is no defence. I think that probably, for more than one reason, but for one certainly, this petition ought never to have been presented, and that it must be dismissed with costs.

THE LORD JUSTICE TURNER. — I was desirous of hearing the argument throughout, for the purpose of seeing whether the application of the case of *Hammersley v. De Biel*, before the House of Lords, to the present case, was affected by what was said by Lord COTTENHAM in *Lassence v. Tierney*. I am now satisfied that it is not. What Lord COTTENHAM said in *Lassence v. Tierney* was this, that there was nothing against the wife but a parol contract before marriage, and nothing but marriage following, which would not support the contract; and that such a contract could not be carried into effect under the Statute of Frauds. And then he went on to say: "In *Hammersley v. De Biel*, I said that the case was distinguishable, because the husband, \* on his part, having \* 575 contracted before marriage to do something, and having done it, that there was part performance of the contract, the contract relating to property to which he was entitled." Lord COTTENHAM'S observations, therefore, point to the distinction between the cases in which there is no part performance except by the marriage, and the cases in which there is part performance independently of the marriage. Now in the present case there is part performance by the delivery up of possession to Mr. Chartres, a fact which has been always held to change the situations and rights of the parties, and there has been considerable expenditure by him on the property. There is therefore here what was wanting in *Lassence v. Tierney*; namely, acts of part performance besides the marriage. The difficulty in these cases is, that the Statute of Frauds presents an obstacle to suing upon the agreement. But it has been held, in many cases, that if there be a written agreement after marriage in pursuance of a parol agreement before marriage, this takes the case out of the statute, so also does part performance. This view is supported by *Taylor v. Beech*, (a) where Lord HARD-

(a) 1 Ves. sen. 297.

WICKE took the distinction between the case where marriage alone follows and where other acts follow the parol agreement. It is clear that this is an agreement which the Court would have decreed to be specifically performed. I think, therefore, with my learned brother, that the appeal should be dismissed with costs.

THE LORD JUSTICE KNIGHT BRUCE. — We do not intend that the administrator should be allowed these costs out of the estate; we give the costs against him personally.

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\* 576 \* The SOUTH YORKSHIRE RAILWAY and RIVER  
DUN COMPANY *v.* The GREAT NORTHERN RAIL-  
WAY COMPANY.

1853. February 15, 16, & 17. Before the LORDS JUSTICES.

A railway company contracted with another for the use of the line of the latter for a term, at graduated tolls, according to the tonnage carried, which were to be a charge on the tolls and dues of the former company. The former company had no express parliamentary power thus to charge their tolls: *Held*, that the charge was of too doubtful legality to be enforced by an injunction to restrain the former company from paying a dividend to its shareholders until the sums due upon the agreement were provided for, no case being made out showing a probability of there being no fund forthcoming to answer the demand at the hearing.<sup>1</sup>

THIS was an appeal from the refusal by Vice-Chancellor STUART of a motion on behalf of one railway company to restrain another railway company, their directors, treasurer, bankers, and agents, from declaring or paying any dividends, or dividing or appropriating any of their funds or moneys towards paying any dividend

<sup>1</sup> See, as to the extent of the power of corporations to bind themselves by contract, *Hawkes v. The Eastern Counties Railway Company*, 1 De G., M. & G. 737, 760 note (1), and cases; *The Shrewsbury and Birmingham Railway Co. v. The London and North-Western Railway Co.*, 4 De G., M. & G. 115; *South Yorkshire Railway Co. v. Great Northern Railway Company*, 9 Exch. 55, 84; *Bateman v. Ashton-under-Lyne*, 3 H. & N. 323; *Norwich v. Norfolk Railway Company*, 4 El. & Bl. 397; *Angell and Ames Corp.* (9th ed.) §§ 111, 256; *Zulueta's Case*, L. R. 5 Ch. Ap. 444; L. R. 9 Eq. 270. •

among their shareholders, unless and until the defendants should have to pay the amount due to the plaintiffs for tolls, and also to restrain them from withholding or delaying payment on any pretext whatever of the same tolls.

By an indenture dated the 26th of February, 1852, and made between the plaintiffs of the one part, and the defendants of the other part, after reciting, among other things, that the lines and branch lines of railway forming part of the undertaking of the plaintiffs intersected or penetrated into the South Yorkshire coal-field between the towns of Barnsley and Penistone on the one side, and Sheffield, Rotherham, and Swinton on the other side, and formed the means by which the coal, the produce of such coal-field, might be transported to distant places for consumption, and reciting that the said Great Northern Railway communicated with the railways of the plaintiffs by a junction or junctions at or near Doncaster, in the county of York, and reciting that

\* certain agreements and arrangements had been made \* 577  
between the said companies for working each other's lines, it was agreed — That the defendants might, at all times thereafter, during the term of twenty-one years, to commence from July 1, 1851, pass, go, and remain, and have full and free ingress, egress, and regress into, over, upon, and out of the railways, and have the free use of all the works and conveniences of the plaintiffs, and every or any part thereof, with all engines, wagons, or other carriages, officers, servants, and workmen necessary for the purpose of carrying coal: and that such passage of the defendants over or along the said railways of the plaintiffs, and the use of their works and conveniences, should be had and made on payment of such tolls and under such restrictions and conditions as were thereafter specified, and which had been mutually agreed upon between the said companies (that was to say) when and so long as the quantity of coal carried over or upon the said undertaking of the plaintiffs, or any part thereof, to the Great Northern Railway, and thence south of Doncaster on the main line, or south of Misterton on the loop line of the said Great Northern Railway, together with the quantity of coal carried over or upon the said undertaking, or any part thereof, by or for the defendants, or by or for any corporation or person, under or by virtue of any arrangement or agreement with, or by permission of, the defendants, to any railway other than the Great Northern Railway, for



transit to the south of Sheffield or Rotherham, should not amount to 125,000 tons in any period of six calendar months, commencing upon and with any first of July, or first of January, and terminating upon and with any thirty-first of December or thirtieth of June, during the continuance of the said term of twenty-one years, and the first of such periods to commence with the

\* 578 first of July, 1851; then the defendants should pay \* to the plaintiffs such toll for such period of six calendar months as would, with any clear profits which might be made by the plaintiffs, from their undertaking for the same period, after payment of all annual or half-yearly charges for interest, or other outgoings, and all expenses of management and otherwise, be sufficient to enable the plaintiffs to pay such dividends as might, at any time during such period of six calendar months, be or become payable upon, or in respect of, any guaranteed or preference stock or shares of the plaintiffs, already issued, or thereafter to be issued with the knowledge and consent of the defendants, and also a clear net dividend at the rate of 3*l.* per centum per annum for such period of six calendar months, upon the ordinary capital stock or shares for the time being of the plaintiffs, then called up, or thereafter to be called up with the consent of the defendants; and when and so long as the quantity of coal so carried in any such period of six calendar months, as aforesaid, should amount to any of the respective quantities thereafter mentioned, and should not amount to the quantity next succeeding such quantity in the order thereafter contained, then the defendants should pay to the plaintiffs such toll for such passage for such period of six calendar months as would, with any such clear profits as aforesaid, be sufficient to enable the plaintiffs, from time to time, and at all times, to pay any dividends which might, for the time being, become payable upon or in respect of any such guaranteed or preference stock or shares of the plaintiffs as aforesaid, and also a clear net dividend on such ordinary capital stock or shares for the time being of the plaintiffs as aforesaid, at the respective rates thereafter mentioned. Provided nevertheless, that when once the defendants should have become liable to pay to the plaintiffs such toll for such passage as aforesaid for any such period

\* 579 of six calendar months as aforesaid as would \* with any such clear profits, and after payment of such expenses as aforesaid, be sufficient to enable the plaintiffs to pay such dividends

upon guaranteed or preference stock of the plaintiffs as aforesaid, and a net dividend upon the ordinary capital stock or shares of the plaintiffs, not exceeding the rate of 4l. 10s. per centum per annum, for any such period of six calendar months, then and from thenceforth the toll to be paid by the defendants to the plaintiffs for such passage as aforesaid, should never, under any circumstances, recede nor be less for any subsequent period of six calendar months as aforesaid, than such toll as would, with any such clear profits, and after payment of such expenses as aforesaid, be sufficient to enable the plaintiffs to pay such dividends upon guaranteed or preference stock as aforesaid, and also a net dividend upon the ordinary capital stock or shares of the plaintiffs, after the highest rate of such last-mentioned dividend, not exceeding the rate of 4l. 10s. per centum per annum, for any period of six calendar months which the defendants should have theretofore become liable to pay to the plaintiffs by virtue of that agreement, notwithstanding the diminution to any extent in any succeeding period of six calendar months in the quantity of coals regulating the toll to be paid as aforesaid. And it was further agreed by the seventh article, that such toll should be a charge upon the tolls and dues of the defendants, and that if the said tolls should be in arrear for twenty-one days after the same should become payable as aforesaid, the plaintiffs should, in addition to all other legal and equitable rights and remedies for enforcing the same, have power to distrain any of the engines, carriages, plant, stock, goods, chattels, and things of or belonging to the defendants upon the said undertaking of the plaintiffs, for the amount of the toll which might be in arrear and unpaid, together with lawful interest thereon, and all costs, damages, and \* expenses \* 580 which might be occasioned by the non-payment thereof, and to take, hold, and impound any distress or distresses found thereon, and to deal with the same in all respects in like manner as they might take, hold, impound, and deal with any distress or distresses for rent in arrear.

The bill, after stating the agreement, complained that the tolls payable under it to the plaintiffs were in arrear, and prayed for an injunction in the terms of the motion.

*Sir Fitzroy Kelly, Mr. Malins, Mr. Follett, and Mr. W. J. Bovill* supported the motion.

*The Solicitor-General, Mr. Wigram, and Mr. Denison, for the defendants, were not called upon.*

THE LORD JUSTICE KNIGHT BRUCE. — This is not the hearing of the cause. It is a motion by way of appeal, from the refusal of one of the Vice-Chancellors to accede to an interlocutory application for an injunction. The injunction sought is this, that the defendants, the Great Northern Railway Company, their directors, treasurers, bankers, and agents may be restrained from declaring or paying any dividend or dividing or appropriating any of their funds or moneys in or towards the payment of any dividend, to or among the shareholders of the defendants, unless and until the defendants have paid the amount due to the plaintiffs for tolls. That is the only part of the injunction asked that can require to be dealt with; because the latter part is plainly impossible, according to the rules and course of the Court, namely, the application “that the defendants may be restrained from withholding or delaying payment, on any pretext whatever, of the said tolls so due to the plaintiffs as aforesaid.”

\* 581     \* Now I will assume, in favour of the plaintiffs, that their title to the injunction asked, in the words that I have read, is liable to no objection except that arising from the terms of the seventh article of the agreement of 1852, on which agreement alone the plaintiffs can rest their case. It is evident that but for that article, the present claim would be a mere demand by a general creditor against his debtor, the creditor not having obtained judgment. Of course the creditor in such a case could not seek relief against the property of his debtor in the way here sought. But the argument is, that this clause gives a lien, or, in other words, converts the plaintiffs into equitable mortgagees, for what may be due to them under the agreement upon the tolls and dues; that is, as I understand it, upon the entire income substantially of the Great Northern Railway Company; and the first or only question upon the present occasion is, whether such a provision is so plainly or probably valid as to authorize the Court now to act upon it. I confess that, as at present advised, I think it at least very doubtful whether it is competent for a railway company to mortgage the undertaking without a special authority from the legislature. If they cannot legally mortgage it, they cannot equitably mortgage it. If they could create a valid equitable mort-

gage, such a security would be followed by those rights which are incident to an equitable mortgage, and which come in the place of the remedy of a legal mortgagee by ejectment; namely, the right to the appointment of a receiver, attended with all provisions required for making such an appointment effectual. The inconvenience and mischief that must follow from reducing the property of a railway company to such a state are too obvious to render it necessary to dilate upon them. If I had now to decide the question of the validity of this part at least of the agreement, my opinion would be against its validity; \* but I have not \* 582 now to decide that question. I reserve myself upon it, subject only to the remark, that to represent it in the most favourable way to the plaintiffs, as far as my opinion goes, the point is one of too great doubt to justify the Court in making at present the order asked.

Possibly, if the plaintiffs had no other effectual remedy, or possibly, if they were in danger of losing that to which they are entitled, unless the Court should interfere, the Court might interfere, notwithstanding the difficulties. Upon that point I give no opinion, because the facts do not establish such a case. There seems no reason to doubt the ability of the Great Northern Railway Company to pay whatever debt they may be liable to pay when sued. They may be sued either under the deed, or, if the deed is bad, otherwise; and when judgment shall be obtained in an action, if they will not pay without execution being issued, execution may be enforced against their property.

Again, if the deed is valid (and the plaintiffs' whole case here depends upon the validity of the deed), then by the same clause upon which they are suing here, they have power given them to distrain any of the engines, carriages, plant, stock, goods, chattels, and things of or belonging to the defendants, and this distress may be made on the plaintiffs' own line of railway.

THE LORD JUSTICE TURNER.—I concur in the opinion which has been expressed by my learned brother. The claim of the plaintiffs is that of a mere debt, unless it be a valid charge under the seventh article of the agreement. Now, it is unnecessary, in the present stage of this case, to say what this Court would do, if this case were one in which \* the charge was perfectly \* 583 clear; in which case it might be the duty of the Court to

interfere by injunction. It is equally unnecessary to say what the Court would do, if, the charge not being clear, there was danger to these plaintiffs of the fund not being forthcoming to answer the charge when the validity or invalidity of it came to be tried at the hearing of the cause.

The two questions here are, as it seems to me: first, whether there is or is not a clear charge, undoubtedly valid in law, created by the terms of this agreement upon the tolls and dues of the Great Northern Railway Company; and, secondly, if there be not a clear charge, whether there is any danger to the plaintiffs of there not being a fund to answer the charge when the cause shall come on to be heard. Now, with reference to the question whether this charge can be said to be a perfectly clear charge, I certainly am by no means prepared to say that it can be so considered. It is said, that the eighty-seventh section of the Railways Clauses Consolidation Act gives power to one company to make arrangements with another company for the carriages of the one passing over the line of the other, upon the payment of such tolls and under such conditions and restrictions as may be mutually agreed upon, and that this charge might well be made under the words "under such conditions and restrictions." But it is obvious that these words may at least admit of this construction, that the conditions and restrictions contemplated are such as are incident to passing over the line, as, for instance, the regulations of the one company and of the other, with reference to the periods at which the trains should pass, and are not "conditions and restrictions" in or forming part of the agreement. Then it is said that it may be a valid charge by reason of another part of

\* 584 the same section, which authorizes railway companies \* to enter into any contract for the division and apportionment of the tolls to be taken on the respective railways. This provision, however, may have been meant by the legislature to refer to the division and apportionment among the several owners of the different parts of the line of a gross sum to be paid for the transit along the whole line. It is not necessary now to say that either of the constructions which I have suggested would, at the hearing of the cause, be put on the statute. It is sufficient to say that at least the statute is open to doubt on these points, and that the validity or invalidity of this agreement may depend upon the con-

struction which the Court at the hearing may put on those particular provisions of the statute.

Then, with reference to the question whether there is any danger to the plaintiffs of the fund not being forthcoming in the event of their succeeding in establishing the claim, it is perfectly clear that if the plaintiffs succeed this is a debt of the Great Northern Railway Company and a charge on their funds, and the plaintiffs have therefore the whole of the funds and assets of the company to answer their claim. It is equally clear that the plaintiffs have power now to distrain upon the company, and that they can proceed at law, by action, and recover judgment against them.

Upon these grounds I am of opinion that the Court ought not to interfere.

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\* In the Matter of JAMES CAMPBELL, One, &c. \* 585

1853. February 18. Before the LORDS JUSTICES.

The omission by a client to file a certificate of taxation of a solicitor's bill within the four days prescribed by the Order of October 29, 1692, does not render the order a nullity, but the client's representatives, after his death, may, notwithstanding the omission, obtain an order under the summary jurisdiction, for the delivering up of the client's papers on payment of the amount of the bill as taxed, and an action by the solicitor on the bill, after such taxation, is a contempt, and will be restrained by injunction at the instance of the representatives.

THIS was the appeal of an attorney and solicitor from an order of the Master of the Rolls, dated the 17th of January, 1853, restraining the appellant from further proceeding in an action at law against the respondents, Mary Pollard Creft, and Isabella Creft, as the executrixes of Elizabeth Creft, and ordering the appellant to deliver to the respondents, within ten days after the service of the order, upon oath, the several deeds, books, papers, and writings in his custody or power belonging to the testatrix, and referring it to the taxing master to tax the respondents their costs of and relating to their application, and to deduct therefrom 9*l.* 7*s.* 2*d.*, being the amount certified by the taxing master to be due to the appellant from the testatrix, and ordering that the

appellant should pay to the respondents the balance of the costs when so taxed and certified.

On the 23d of May, 1850, the testatrix presented her petition to the Master of the Rolls, praying for taxation of the appellant's bill.

Upon the petition the usual order was made containing the usual direction, that no proceedings at law or otherwise should be commenced against the petitioner in respect of the bill pending the reference thereby directed, and that the petitioner should procure the Master's report in a month (unless the Master should certify that further time was necessary to enable him to \* 586 make his \* report), or otherwise that the order should be of no effect.

The taxing master to whom the reference was made, by his certificate, dated the 13th of August, 1850, certified he had taxed the bill, the amount of which was 61*l.* 13*s.* 9*d.*, at 32*l.* 1*s.* 7*d.*, and he found that the appellant had at different times received of or on account of the testatrix, several sums of money, amounting to the sum of 152*l.*, and that he had paid to or on account of the testatrix several sums of money, amounting together to the sum of 145*l.* 8*s.*, leaving 25*l.* 9*s.* 7*d.* only due to the solicitor, the bill as taxed being thus less by a sixth part than the bill delivered. And the taxing master taxed the testatrix her costs of that reference at the sum of 16*l.* 2*s.* 5*d.*, and he certified that 9*l.* 7*s.* 2*d.* was the amount due from the testatrix to the appellant, after deducting the sum of 16*l.* 2*s.* 5*d.* from the sum of 25*l.* 9*s.* 7*d.*

The testatrix died on the 31st of December, 1851, without having filed any certificate of the taxation according to the provisions of the Order of October 29th, 1692. (a)

(a) Sanders' Orders, p. 397, "That all reports or certificates that shall be made and signed by any of the Masters of this Court shall, by him that sueth forth or taketh the same from the respective Masters, be filed with the registrar of this Court within four days after the making and signing thereof; and that the registrar, when any report or certificate is brought to be filed, shall indorse on the back thereof the day of the receiving and filing such report and certificate; and that all proceedings which shall hereafter be grounded on any report or certificate not filed as aforesaid shall be utterly void and of none effect; and such neglect of filing being made appear to their Lordships, by the certificate of the register, shall be good cause for the discharging of all proceedings thereupon and also for the incurring such further costs as their Lordships shall think fit to inflict on the party offending contrary thereto." But see 2 Smith's Chancery

\* On the 2d of July, 1852, the respondents caused the \* 587 9*l.* 7*s.* 2*d.* to be formally tendered to the appellant, and demanded the delivery of the documents ; but the appellant refused to accept such tender, or make such delivery.

On the 13th of November, 1852, the appellant commenced an action in the Court of Exchequer against the respondents, to recover 55*l.* 1*s.* 9*d.* for work done as an attorney and solicitor, and materials for the same provided by him for Elizabeth Creft, deceased, upon her retainer, and for fees due and payable to him in respect thereof, being in fact the amount of the bill of costs for 61*l.* 13*s.* 9*d.* referred for taxation and taxed as aforesaid, less the sum of 6*l.* 12*s.*, the excess of the receipts of the appellant on account of Elizabeth Creft, deceased, over his payments to her, or on her account, as certified by the taxing master.

The respondents then presented their petition to the Master of the Rolls, praying for an injunction to restrain the prosecution of the action, and for the delivery up of the documents belonging to the testatrix. Upon this petition the order appealed from was made.

*Mr. Baily* and *Mr. Baggallay*, for the appellant, cited the above Order of the 29th of October, 1692, and *Rushton v. Troughton*, (a) and contended that at all events a certificate not filed, as in this case, before the death of the client, was a nullity, since the client's undertaking was then gone. They further contended that the Court had no authority under the summary \*jurisdic- \* 588 tion to restrain the appellant from suing at law.

*Mr. Daniel* and *Mr. Southgate*, for the administrator of the client, were not called upon.

THE LORD JUSTICE KNIGHT BRUCE. — A woman living in Devonshire, neither very young nor very rich, employed a solicitor in that part of the world, and they did not agree, whereupon she, under such advice as she could procure, obtained an order to tax his bill in the usual form and manner, which order now stands, and has never been complained of. The taxation of the bill pro-

Practice, 377 (3d ed.), citing *Harris v. De Tastet*, 1 S. & S. 263, and *Eyles v. Ward*, 2 P. W. 518.

(a) 2 Sim. 33.



ceeded and was completed. The bill as delivered exceeded 60*l.*, but by the taxation and the costs of the taxation was reduced to something under 10*l.* For as more than one-sixth was taken off he became liable to the costs. The taxation was completed in August, 1850, and the Master issued his certificate. The lady lived until the end of 1851. During this time, a year and six months, it appears that the certificate of the Master was not filed; but the solicitor did not require it to be filed or complain of its not having been filed, nor has he ever alleged that he was unaware of its nature, which he must be taken to have well known.

It has been argued, on his behalf, that by this omission the certificate became void; but I am clearly of opinion that it did not. It may very well be that until filing it no proceedings could be taken under it, or for the purpose of complaining of it. That is quite a different question. There is no pretence for the argument that the certificate was invalid by reason that it was not filed.

\* 589 \* The lady having died in December, 1851, without having paid this small amount due from her, a tender or substantially a tender of that sum was, in the following July, made to the solicitor on behalf of her representative, her daughter, accompanied by a demand of her papers, which on payment he was bound to return. He refused to return them, upon the ground, as I understand,—an utterly mistaken ground,—that the taxation was invalid for the reason that I have before mentioned. Some months afterwards, still retaining the deeds and having declined to receive the money, he took the strange course, which is very greatly to be regretted, of bringing an action for the whole amount of his bill, as if no taxation had been had. Whether that was a contempt of the Court, I am not prepared to say; but this I will say, that it was a course which no solicitor ought to have taken, that it was a course which a solicitor would be justly and highly censurable for advising or permitting a client to take. To take it on his own behalf and in his own case was still more censurable.

A petition was presented at the Rolls, for the delivery of the deeds and for the stay of the action, and the Master of the Rolls, with perfect propriety, made the order with costs, but allowed the solicitor the 9*l.* due to him. Considering that his Honor was dealing with a case which affected the general interests of society,

and particularly the whole class of solicitors, I think that it would have been to forget what was due to the Court, to society, and to justice, not to make the order. I am not sure that I am doing right in not giving my voice for a stronger decision than merely saying, as I do, that the appeal ought to be dismissed with costs.

\* THE LORD JUSTICE TURNER. — I fully concur in every one \* 590 of the observations which have been made upon the proceedings taken by this solicitor, and I think that it was a high contempt to do that which in effect brought the certificate of taxation made by an officer of this Court, under the cognizance of a Court of Law. The petition of appeal must of course be dismissed, and with costs.

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### HAYNES v. HAYNES.

1853. February 19. Before the LORDS JUSTICES.

A testator, after bequeathing two pecuniary legacies, bequeathed three "clear" annuities for the lives of the annuitants. He then bequeathed his residuary estate in trust to pay a clear annuity of 1000*l.* to his widow, and upon trust, after payment of the four annuities, to pay the residue of the income during the life of the widow to A. The capital of the residue, after the widow's death, was to be held as to 5000*l.* upon such trusts as the widow should appoint, and subject to her appointment the 5000*l.* was to be held in trust for B. for life, and after her death to fall into the general residue; and subject to such disposition as aforesaid, and as to the residue of the testator's estate and effects after the widow's death, and subject as to the 5000*l.* and the interest thereof as aforesaid, upon trust to pay certain legacies amounting to 18,000*l.*, with an ultimate residuary gift to E. And there was a direction that, upon the death of the several annuitants, the funds on which the annuities were secured should follow the ultimate destination of the residue:  
*Held, —*

1. That the two first-mentioned pecuniary legacies and three annuities had priority over every other gift.<sup>1</sup>
2. That the annuities were given free of legacy duty.<sup>2</sup>
3. That the annuities were charged on the capital of the residue, but that A. was entitled to retain the surplus income paid to her in one year, and to receive

<sup>1</sup> See *Miller v. Huddlestons*, 3 M'N. & G. 513, and cases in notes; *Ward v. Gray*, 26 Beav. 485.

<sup>2</sup> See 1 *Jarman Wills* (3d Eng. ed.), 173 in note (m).

the surplus for another, although the income was in the subsequent years insufficient to answer the annuities.<sup>1</sup>

4. That on the death of an annuitant in the life-time of the widow the ultimate residuary legatee did not become at once entitled to the fund set apart to answer the annuity.
5. That after the widow's death the 5000*l.* would have no priority over the other reversionary legacies.
6. That the reversionary legatees were not entitled to have any surplus income during the widow's life set apart to secure payment of their legacies.<sup>2</sup>

THIS was a special case, which by leave came on to be heard in the first instance before the Lords Justices, for the purpose of determining the construction to be put upon the will of Edmund Haynes.

\* 591     \* By the will, dated the 30th December, 1845, the testator, after directing payment of his debts and funeral and testamentary expenses, bequeathed a legacy of 19*l.* 19*s.* to his brother, and bequeathed to Elizabeth Haffey Reed the sum of 3500*l.* He then gave and bequeathed unto his wife, her executors, administrators, and assigns, all his household goods, furniture, books, plate, wines, linen, and china, horses, carriage, and effects of every description which should be in or upon his dwelling-house and premises at the time of his decease absolutely. And he bequeathed unto Mrs. Anna Isabella Anderson, for her life, a clear annuity or yearly sum of 100*l.*; and he bequeathed unto his sister, Dorothy Haswell, for her life, a clear annuity or yearly sum of 30*l.*; and to his sister, Ann Ellcock Walton, for her life, a clear annuity or yearly sum of 70*l.*; and he directed the same several annuities to be paid on the 1st of September in each and every year during the lives of the respective annuitants, by his trustees and executors thereafter named; the first payment of the said annuities to be made on such first day of September as should occur next after his decease. And he devised and bequeathed all that his dwelling-house, gardens, stables, and premises in which he then resided, situate at Summerland Place, together with all the rest, residue, and remainder of his real and personal estate, whatsoever and wheresoever, and of what nature or kind soever, unto the plaintiff,

<sup>1</sup> *Miller v. Huddlestons*, 3 M'N. & G. 513; *Wright v. Callender*, 2 De G., M. & G. 652; *Bagne v. Dumergue*, 10 Hare, 462; *Miner v. Baldwin*, 1 Sm. & G. 522.

<sup>2</sup> "Residue" is not a "legacy" in the ordinary sense of the term, though the person taking it is a residuary legatee. *Ward v. Grey*, 26 Beav. 485.

his heirs, executors, administrators, and assigns, according to the nature and quality thereof respectively, upon trust, in the first place, out of the moneys which should come to his or their hands, to set apart and appropriate a sufficient part thereof, or fund, in the names or name of his said trustee, to raise and pay unto his wife one clear annuity or yearly sum of 1000*l.*, by equal proportions quarterly, during her life, on the four most usual days of payment of rent in the year, the first payment thereof \* to \* 592 be made on such of the said days as should occur next after his decease; but no proportion of the said annuity was to be payable for the days of the current quarter which should have elapsed from the date of the last payment to the day of the death of the said annuitant. And he thereby gave and bequeathed the said annuity or yearly sum of 1000*l.* to his said wife during her life accordingly. And after full payment and satisfaction of the aforesaid four annuities thereinbefore given, upon trust to pay all the surplus or residue of the annual interest, income, and dividends arising out of the residue of his said estate and effects during the lifetime of his wife unto Ann Elvira Reed and her assigns absolutely. And from and immediately after the decease of his wife, as to the sum of 5000*l.* sterling, part of the principal or residue of his estate and effects, upon trust that his trustee should pay and apply the said sum of 5000*l.*, or any part thereof, to such person and persons and in such manner and form as his wife by any deed or deeds, or by her last will and testament in writing, should direct or appoint, give or bequeath, the same or any part thereof, or for want of any such direction or appointment, gift or devise, and so far as any such, if incomplete, should not extend, and as to such parts thereof as should remain undisposed of by his wife, upon trust as to the annual interest and dividends of the 5000*l.*, and he gave and bequeathed the same interest and dividends unto Elizabeth Reed, for her life; and as to the principal sum of 5000*l.*, he directed that the same should go with and become part of his residuary estate and effects after the death of the survivor of them, his wife and Elizabeth Reed, subject to such disposition thereof by his wife as aforesaid; and as to the remainder of the said principal or residue of his estate and effects after the decease of his wife (but subject, nevertheless, to the annuities to Mrs. Anderson, Mrs. Haswell, and Mrs. \* Ann Ellcock Walton as aforesaid, and also \* 593 subject as to the said 5000*l.* and the interest thereof subject

as aforesaid), upon trust that his trustee might and should pay, and he thereby gave and bequeathed the same as follows, that was to say: To his nephew, Freeman Oliver Haynes, the sum of 2000*l.*; to the aforesaid Elizabeth Haffey Reed, the sum of 9000*l.*; to the defendant Jane Morris Reed, the sum of 1000*l.*; to the defendant Lucy Haynes Reed, the sum of 2000*l.*; and to the defendant Frances Haynes Reed, the sum of 1000*l.*; to the defendant Haynes Walton, the defendant Dorothy Walton, Charlotte Brown, and to Henry Haynes Walton, the sum of 1000*l.* each. And, subject as aforesaid, he gave, devised, and bequeathed all the rest, residue, and remainder of his estate and effects, both real and personal, whatsoever and wheresoever, unto Elizabeth Haffey Reed, her heirs, executors, administrators, and assigns absolutely. And he thereby directed and requested that the dwelling-house and premises might not be sold or disposed of in the lifetime of his wife, without her consent; but after her decease, and in case he should not leave sufficient moneys behind him to enable his trustees and executors to discharge the several annuities and legacies so given and bequeathed as aforesaid, then he thereby directed and empowered his trustees and executors to sell his dwelling-house, gardens, stables, and premises, either by public auction or private contract, as they might think proper, and pay and apply the proceeds arising from such sales, or so much thereof as should be necessary for the same, towards the payment of the same annuities and legacies respectively. And if the whole of such proceeds should not be consumed in such payments, then he thereby directed that the overplus, if any, should fall into and be considered as part of his residuary estate and effects, and go and be applied as in and by his will was directed. And he directed and

\* 594 requested that none \* of the funds, investments, or securities in which his property might be invested at the time of his decease might be altered, varied, or changed during the lifetime of his wife without her consent; yet with her consent it was his will that the same should and might be altered and changed as she might, with the consent of his trustees, direct. And he thereby directed that upon and after the death of the several annuitants, and the consequent cesser of the annuities, the several parts or funds upon which the same were or was respectively invested or secured, or out of which the same were or was respectively pay-

able, should follow the ultimate destination of the residue of his said estate.

The actual income which had arisen from the testator's estate during the first year from his decease amounted to 1298*l.* 1*s.* 6*d.* (after deducting income-tax), and the four annuities given by the will (after deducting income-tax) amounted to 1165*l.*; so that during the first year there was a surplus income of the testator's estate amounting to 188*l.* 1*s.* 6*d.*, which was at the expiration of the year paid (less the legacy duty) to Ann Elvira Reed.

In the month of November, 1847, a mortgage debt of 3000*l.*, forming part of the assets, was paid off by the mortgagor, and produced the net sum of 2850*l.*, which sum, with the concurrence of the testator's widow, was invested by the plaintiff in the purchase of three per cent consolidated bank annuities.

On the 2d of May, 1848, being the expiration of the second year from the testator's death, there was a surplus income, after payment of the annuities less the income-tax, amounting to 51*l.* 8*s.* 11*d.*, which was retained in the hands of the plaintiff.

At the expiration of the third year there was a deficiency \* of income to pay the several annuities by 146*l.* 2*s.* 3*d.*, and \* 595 in the fourth and fifth years the income was deficient by the respective sums of 361*l.* 12*s.* 9*d.* and 408*l.* 19*s.* 3*d.* to answer the annuities.

No parts of the testator's estate were ever particularly set apart or appropriated for payment of the annuities given by the will; but the annuities were paid by and out of the general income of the testator's estate so far as the same extended.

The income for the testator's estate ending in May, 1852, again proved insufficient to pay the annuities in full, the deficiency in that year amounting to 305*l.* 11*d.*, which deficiency, as well as all the preceding, had been borne exclusively by the annuity of the widow, the other three having been paid always in full.

Elizabeth Haffey Reed had married a Mr. Walton, and a settlement was executed on her marriage, which comprised her interest under the will.

Mrs. Anna Isabella Anderson, one of the annuitants, had died.

The widow was still living.

The questions for the consideration of the Court were the following:—

1. Whether the legacy of 3500*l.* had priority over the annuities, or over the other legacies, or any and which of them.

2. Whether the annuities were bequeathed free of legacy duty.

\* 596     \* 3. Whether Ann Elvira Reed was entitled to retain the 133*l.* 1*s.* 6*d.* which had been paid to her as the surplus income from the testator's estate at the expiration of one year from the testator's death, and to receive from the testator's estate the sum of 51*l.* 8*s.* 11*d.*, being the surplus income at the expiration of the second year.

4. Whether the widow was entitled to have the sums of 146*l.* 2*s.* 3*d.*, 361*l.* 12*s.* 9*d.*, 408*l.* 19*s.* 3*d.*, and 305*l.* 11*d.*, being the amount of the deficiency of the income of the testator's estate for the last four years, and the deficiency of income for the current year to pay her annuity, or any and what part of such deficiency made good out of the surplus of the preceding years, or out of the *corpus* or principal of the testator's estate.

5. Whether the annuitants, other than the widow, were entitled to priority over her annuity.

6. Whether the trustees of the settlement of Elizabeth Haffey Walton became, on the death of the annuitant Anna Isabella Anderson, entitled in possession to any and what portion of the *corpus* of the testator's estate under the clause in the testator's will relative to the cesser of the annuities given by his will.

7. Whether the legacy of 5000*l.* was entitled, according to the true construction of the testator's will, to priority over the other legacies payable at the decease of Lucretia Haynes, or any and which of them.

8. Whether the persons interested in the legacies given by the testator's will, and payable after the decease of his widow Lucretia Haynes, were entitled to have any and what proportion of the past or future income of the testator's estate set apart in order to provide for a possible deficiency of his estate to pay all the legacies.

\* 597     \* 9. Whether the annuities and legacies given by the testator's will, or any and which of them, were subject to abatement *inter se*, and, if so, upon what principle such abatement should be made.

*Mr. Lewin* and *Mr. Ware* stated the case on behalf of the plaintiff, the trustee.

Upon the question of the priority of the legacies of 19*l.* 19*s.* and 3500*l.*, and the three smaller annuities, *Mr. Rolt* and *Mr. J. V. Prior*, for the widow, contended that neither these legacies nor the three smaller annuities had priority over the annuity of 1000*l.*

*Mr. Walker* and *Mr. Begbie*, for some of the reversionary legatees, relied upon *Thwaites v. Foreman*, (a) where the Vice-Chancellor KNIGHT BRUCE said: "*Prima facie*, all bequests stand on an equal footing, and it lies upon those who assert the contrary to prove it. It is not sufficient that the words in the will should leave the question in doubt. They must positively and clearly establish that it was the intention of the testator that the bequests should not stand upon an equal footing." They contended that no such intention was here indicated.

They also referred to the rule similarly laid down in *Brown v. Brown*. (b)

Their Lordships, without calling on the counsel for the other parties on this question, decided that the two legacies and three annuities were payable *pari passu*, but that they had priority over the other gifts.

\* Upon the question of the legacies being subject to legacy duty, *Mr. Rolt* and *Mr. Prior* for the widow, and *Mr. Bazalgette* and *Mr. Jessell*, for the other annuitants, contended that the annuities were free from duty. \* 598

*Mr. Walker* and *Mr. Begbie*, contra.

*Gude v. Mumford*, (c) *Sanders v. Kiddell*, (d) *Marris v. Burton*, (e) *Ford v. Ruxton*, (g) *Courtois v. Vincent*, (h) *Baily v. Boulton*, (i) were cited.

(a) 1 Coll. 409.

(b) 1 Keen, 275.

(c) 2 Y. & C. 448.

(d) 7 Sim. 536.

(e) 11 Sim. 161.

(g) 1 Coll. 403.

(h) T. & R. 433.

(i) 14 Beav. 596.



The Lord Justice KNIGHT BRUCE said that he considered this point as settled in favour of the annuitants by authority which ought not to be disturbed, although, in the absence of authority, he might have held differently.

The Lord Justice TURNER concurred.

Upon the question whether the annuities were payable out of the *corpus*, *Mr. Walker* and *Mr. Begbie* referred to *Foster v. Smith*, (a) *Innes v. Mitchell*, (b) and *Wroughton v. Colquhoun*. (c)

*Mr. Bacon* and *Mr. Baggallay*, for other parties.

The Lord Justice KNIGHT BRUCE said that the will was \* 599 not very clear upon this point, as to the \* widow's annuity.

There appeared some force in the argument, derived from the direction in the will, that the securities were not to be changed without the consent of the widow, but not sufficient to prevail against the inference to be drawn from other parts of the will that the annuity was intended to be paid in full. His Lordship held that all the annuities were payable out of the capital.

The Lord Justice TURNER was of opinion, that the gift to the widow, being of a clear annuity or yearly sum, took precedence of the gift of the residue, and that the words "after full payment and satisfaction of the aforesaid four annuities," overrode the provisions for the distribution of the capital after the death of the widow, and that all the annuities were payable out of the capital.

The other questions were then discussed.

The following was the substance of the decree:—

1. Declare that the legacies of 19*l.* 19*s.* and 3500*l.*, and the annuities of 100*l.*, 30*l.*, and 70*l.*, bequeathed by the will of the testator, have priority over all other gifts in the said will.

2. Declare that the annuities of 100*l.*, 30*l.*, and 70*l.* are given free of legacy duty, and that the legacy duty is payable out of the *corpus* of the testator's property.

(a) 1 Ph. 629.

(c) 1 De G. & S. 357.

(b) 1 Ph. 710. •

3. Declare that Ann Elvira Reed is entitled to retain the sum of 138*l.* 1*s.* 6*d.* paid to her, and to the sum of 51*l.* 8*s.* 11*d.* now in the hands of the plaintiff.

4. Declare that the annuity of 1000*l.* given to Lucretia \* Haynes is chargeable upon the capital of the testator's \* 600 estate in priority to the legacies given after her death, and that she is entitled to have the sums of 146*l.* 2*s.* 3*d.*, 361*l.* 12*s.* 9*d.*, 408*l.* 19*s.* 3*d.*, and 305*l.* 11*d.*, and any arrears of the annuity since accrued, raised out of the *corpus* of the estate.

5. Declare that the annuitants, other than Lucretia Haynes, under the said will, are entitled to have the deficiency of income to pay their annuities, made good out of the *corpus* of the estate, whether Lucretia Haynes consent or not.

6. Declare that the trustees of Elizabeth Haffey Walton's settlement did not, on the death of Anna Isabella Anderson, become entitled in possession to any portion of the *corpus* of the said estate, but that the funds out of which the annuity of Anna Isabella Anderson was payable followed the devolution of the said testator's residuary estate.

7. Declare that the legacy of 5000*l.*, which is subject to the power of appointment by Lucretia Haynes, has no priority over the other legacies payable at the decease of the said Lucretia Haynes.

8. Declare that no part of the past or future income of the estate ought to be set apart to provide for a possible deficiency of the estate to pay all the legacies made payable at the death of Lucretia Haynes.

9. Declare that the legacies payable at the death of Lucretia Haynes, will, in case of deficiency, be liable to abate *inter se pari passu*.<sup>1</sup>

Costs of all parties out of the capital of the estate.

<sup>1</sup> See *Purse v. Snaplin*, 1 Atk. 414; *Fonnereau v. Poyntz*, 1 Bro. C. C. 472; *Croly v. Weld*, 3 De G., M. & G. 993; *Beeston v. Booth*, 4 Mad. 161; *Lord Dunboyne v. Brander*, 18 Beav. 313; *Eavestaff v. Austin*, 19 Beav. 591; *Ashburnham v. Ashburnham*, 16 Sim. 186; *Creed v. Creed*, 1 Dr. & War. 416; S. C., 11 Cl. & Fin. 491.

1853. February 23. Before the LORDS JUSTICES.

By a will commencing thus, "I give and bequeath the several legacies and annual sums following," a testatrix bequeathed pecuniary legacies and an annuity, and directed two sums of money to be set apart sufficient to produce two other specified annual sums, which the testatrix bequeathed to two specified persons for their respective lives. She gave to trustees the residue of her personal estate, subject to the payment of her debts, funeral and testamentary expenses, and the legacies and annuities which she had bequeathed or might thereafter bequeath by any codicil. And she devised her real estates to trustees for a term, upon trust to raise sufficient to pay her debts, legacies, and funeral and testamentary expenses, but directed that her personal estate should be the primary and the term the secondary fund for payment of her debts, legacies, and funeral and testamentary expenses: *Held*, that the separate specification of "annuities" in some parts of the will did not prevent annuities from being comprehended under the expression ["legacies" in the trusts of the term.<sup>1</sup>

THIS was a special case, which came on to be heard by their Lordships originally. The question was, whether the word legacies in a will included annuities.

The will was that of Mrs. Frances Maria Scott, dated the 22d of October, 1844, which was so far as material as follows: "I give and bequeath the several legacies and annual sums hereinafter mentioned to the several persons hereinafter named." The will then, after bequeathing several legacies of gross sums of money, proceeded thus: "I give and bequeath unto Mary Nugent, widow, and her assigns, for and during the term of her natural life, provided she continue the widow of Nicholas Nugent, but not otherwise, one annuity or clear yearly sum of 100*l.* of lawful money of Great Britain." The testatrix then directed her trustees thereafter named to invest such a sum out of her general personal estate as would when invested in their names in the parliamentary stocks or public funds of Great Britain produce by the dividends, interest, and annual produce thereof the clear annual sum of 400*l.* And she directed that they her said trustees should stand and be possessed of the stocks or funds in or upon which the said sum should be invested, and the dividends, interest, and annual produce

<sup>1</sup> See 2 Jarman Wills (3d Eng. ed.), 576.

thereof \* upon the trusts following (that was to say), upon \* 602 trust that they her trustees and the survivors and survivor of them, and the executors, administrators, and assigns of such survivor, should pay the dividends, interest, and annual produce unto, or permit the same to be received by Emily Weston and her assigns for her natural life, and from and immediately after her decease should stand and be possessed of and interested in the stocks, funds, and securities, and the dividends, interest, and annual produce thereof, in trust for the children of Emily Weston, in such shares and with such restrictions as therein particularly mentioned; and in case there should be no child or children of Emily Weston who should become entitled to the trust fund under the aforesaid trusts, then as to one equal fourth part of the dividends, interest, and annual produce of the trust moneys, stocks, funds, and securities, upon trust that they the trustees should pay the same unto or permit the same to be received by Emma Blair and her assigns for her life; and as to one other equal fourth part of the dividends, interest, and annual produce of the trust moneys, stocks, funds, and securities, upon trust that they her trustees should pay the same unto or permit the same to be received by Charlotte Johnson for her life; and as to the said two equal fourth parts of the trust moneys, stocks, funds, and securities from and after the respective deceases of Emma Blair and Charlotte Johnson; and as to the remaining two equal fourth parts of the trust moneys, stocks, funds, and securities, and the dividends, interest, and annual produce thereof, after the decease of Emily Weston and such failure of her children as aforesaid, the same should sink into and form part of her the testatrix's residuary personal estate, thereafter bequeathed. The testatrix thereby also directed her trustees, and the survivors and survivor of them, and the executors, administrators, and assigns of such survivor, to invest such a sum out of her \* personal estate as would be suffi- \* 603 cient, when invested in their names in the parliamentary stocks or public funds, to produce by the dividends, interest, and annual produce thereof the clear yearly sum of 200*l.*, and to stand and be possessed of the stocks or funds in or upon which the last-mentioned sum should be so invested, and the dividends, interest, and annual produce thereof, upon trust for such person or persons as her the testatrix's goddaughter, Frances Maria Armstrong, should appoint. And in default thereof into the proper hands of

Frances Maria Armstrong for her separate use. And after the decease of Frances Maria Armstrong, then as to the trust moneys, stocks, funds, and securities, and the dividends, interest, and annual produce thereof, in trust for such persons as Frances Maria Armstrong should appoint; and in default of appointment then the last-mentioned trust moneys, stocks, funds, and securities, and the dividends, interest, and annual produce thereof, should sink into and form part of the testatrix's residuary personal estate thereafter bequeathed. And the testatrix gave, devised, and bequeathed all her freehold and copyhold messuages, farms, lands, tenements, tithes, and hereditaments, whatsoever and wheresoever, whether in possession, reversion, remainder, or expectancy as to her freehold hereditaments, to the use of Chas. Heath and Chas. Shapland Whitmore, their executors, administrators, and assigns for the term of 1000 years, to commence and be computed from the day of her decease, upon the trusts and subject to the powers and declarations thereafter expressed. And as to, for, and concerning all the residue and remainder of the testatrix's personal estate and effects, of what nature or kind soever, and wherever situate or being (subject to and charged with the payment of her just debts and funeral and testamentary expenses, and the legacies and annuities thereinbefore bequeathed, and which she

\* 604 \* might bequeath by any codicil or codicils thereto), the testatrix gave and bequeathed the same to the like persons and in like manner as she had before devised the said real estate. And as to the term of 1000 years thereinbefore limited to C. Heath and C. S. Whitmore, their executors, administrators, and assigns, the testatrix declared that the same term was so limited to them upon trust that they, or the survivor of them, or the executors or administrators of such survivor, should, as soon as conveniently might be after her decease, by demising, assigning, mortgaging, selling, or otherwise disposing of the farms, messuages, lands, tenements, hereditaments, and premises comprised in the term of 1000 years, or any of them, or any part thereof, for the whole or any part of the said term, or by, with, and out of the rents and profits of the hereditaments and premises or any of them, or by bringing actions against the tenants or occupiers of the same hereditaments or any of them, for the rent then in arrear, or by more than one, or by all the aforesaid ways and means, or by any other reasonable ways and means, levy and raise any sum or sums

of money which the said C. Heath and C. S. Whitmore, or the survivor of them, or the executors or administrators of such survivor, should in their or his discretion think fit or expedient to levy and raise for the payment of the testatrix's debts, legacies, and funeral and testamentary expenses, and should pay and apply the moneys to be levied and raised by the ways and means aforesaid, or any of them, in or towards the payment or satisfaction and discharge of her debts, legacies, and funeral and testamentary expenses; provided always, and the testatrix thereby declared, that her personal estate should be considered as the primary, and the term of 1000 years the secondary, fund for the payment of her debts, legacies, funeral and testamentary expenses; and the testatrix appointed Henry Luttrell, \* Chas. Heath, Chas. Shapland \* 605 Whitmore, and Robert Gwyn joint executors of her will.

The testatrix died on the 5th of September, 1845.

The testatrix's personal estate after payment of her debts, legacies, and expenses, was insufficient for payment of the legacies, and of the annuity of 100*l.* to Mrs. Nugent, and of the two sums directed to be invested sufficient to produce the annual income of 200*l.* and 400*l.*

The question for the opinion of the Court was, whether the annuity of 100*l.* and the sums directed to be invested sufficient to produce the annual sums of 400*l.* and 200*l.*, or any and which of them, were or was to be considered as legacies within the meaning of the will, so as to make them chargeable on the real estate or raisable under the trusts of the term for 1000 years.

*Mr. Wigram, Mr. Rolt, Mr. Malins, Mr. W. M. James, Mr. Schomberg, and Mr. Dickinson* appeared for the several parties.

The following cases were cited: *Sibley v. Perry*, (a) *Nannock v. Horton*, (b) *Bonner v. Bonner*, (c) *Shipperdson v. Tower*, (d) *Bromley v. Wright*, (e) *Cornfield v. Wyndham*. (g)

[In the course of the argument the Lord Justice KNIGHT BRUCE inquired whether it was meant to be contended that if a testator in one place mentioned both the genus and one species included

(a) 7 Ves. 522.

(b) 7 Ves. 391.

(c) 13 Ves. 379.

(d) 1 Y. & C. C. C. 441.

(e) 7 Hare, 334.

(g) 2 Coll. 184.

\* 606 in the genus he must in \* every other place be taken to have excluded that species from the genus, or that by having committed superfluity in one instance a testator was bound to it in every other.]

THE LORD JUSTICE KNIGHT BRUCE. — The word “legacies” is a proper word to designate legacies given in the shape of annuities as well as those given in the shape of a bequest of a sum payable at once. That being the proper meaning of the word, it lies upon those who say that it is not to be so construed to show from the context of the will that the testatrix used it in another sense. The rule of construction applicable to such cases cannot perhaps be better expressed than it is in *Church v. Mundy*, (a) where Lord ELDON says: “It is much more safe to consider those subjects intended which the words describe, than to supply a purpose by conjecture; determining for the testator upon the more or less convenience with which that subject may be, which he has declared shall be, applied. The best rule of construction is that which takes the words to comprehend a subject that falls within their usual sense, unless there is something like declaration plain to the contrary.” Here there is no declaration to the contrary, nor any thing like it. There may be room for conjecture if the words are looked at apart from the context; but it appears to me that the bequests of annual sums as well as of others are comprehended in the trusts under the word “legacies,” and were intended to be so.

THE LORD JUSTICE TURNER. — The general rule is that the word legacies will comprehend annuities.<sup>1</sup> But if the general \* 607 rule were the \* other way, I am not sure whether there would not be sufficient indication of intention on this will to countervail it. There are in the first place the introductory words, “I give and bequeath the several legacies and annual sums hereinafter mentioned.” Now there is only one annuity simply bequeathed as an annuity. Therefore the words “annual sums,” which clearly embrace the annuity, must also extend to the life-interests in the sums directed to be set apart. But these sums are clearly legacies in every sense of the expression. Therefore it is clear that the testatrix made no distinction between the annuity

(a) 15 Ves. 406.

<sup>1</sup> Ward v. Grey, 26 Beav. 485; 2 Jarman Wills (3d Eng. ed.), 576.

and other legacies. The proviso towards the end of the will that the personal estate shall be the primary fund for the payment of the debts, legacies, funeral and testamentary expenses, is also a clear indication that the real estate was to be a secondary fund to make good the legacies for which the personalty was the primary fund, and the annuity was certainly one of the legacies for which the personal estate was the primary fund. I think that the trusts of the term extend to the annuity as well as the other legacies.

Costs out of the estate.

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\* BOULTON v. BEARD.

\* 608

1853. February 24. Before the LORDS JUSTICES.

A testatrix bequeathed her residuary estate upon trust for her sister for life, and after the sister's death to pay, divide, and apply the trust fund in manner following (that is to say), one-tenth to or for the use of R. H., and another one-tenth to or for the use of C. R., for their respective lives, and in case either of them should die in the lifetime of the tenant for life or afterwards leaving lawful issue, then the testatrix directed that the part of him or her so dying leaving lawful issue should go to and be equally divided among his or her children as they should attain twenty-one: *Held*, that a child of C. R., who survived the tenant for life and attained twenty-one, but died in the lifetime of C. R., took a vested interest.<sup>1</sup>

The trustee of the will, who, acting on the opinions of counsel, had distributed the whole estate according to a different view, was ordered to pay to the representatives of the child the amount of the child's share and the costs of the suit.

THIS was an appeal from the decision of the Master of the Rolls upon a claim. The question arose upon the construction of the will of Elizabeth Hobson, dated the 6th of May, 1813, whereby the testatrix gave and bequeathed the moneys to arise from the sale of a messuage or dwelling-house, garden, and hereditaments therein described, and the rents, issues, and profits thereof until such sale should be made, and all other her personal estate and

<sup>1</sup> See *Neathway v. Reed*, 3 De G., M. & G. 18 note, 23 note; *In re Watson's Trusts*, L. R. 10 Eq. 38.



effects to her great-nephews, James Beard and Thomas Holy, their executors, administrators, and assigns, upon trust to pay the yearly interest, proceeds, and profits of the said personal estate unto and to the use of her sister, Sarah Green, for her life. And after the decease of Sarah Green she gave and bequeathed one equal fourth part or share of all her said estate and effects to James Beard, his executors, administrators, and assigns, for his and their own use, charged with a sum of 200*l.* for Jane Beard his sister. And she gave and bequeathed one other equal fourth part or share of all her said estate and effects unto her niece Elizabeth Holy, the wife of the said Thomas Holy, her executors, administrators, and assigns, to and for her and their own use and benefit for ever. And she

gave and bequeathed the remaining half part of all her said  
 \* 609 \* estate and effects to James Beard and Thomas Holy, their executors, administrators, and assigns, upon trust to pay and apply one full equal fifth part or share of the said remaining half part of her said estate and effects unto her nephew John Hobson if he should be living at the time of the death of Sarah Green, to and for his own use and benefit for ever; and in case her said nephew John Hobson should be then dead, leaving lawful issue, then in trust to pay and apply the yearly interest and produce of the said fifth part of the said remaining half part or share of her said estate and effects in the maintenance, education, and bringing up of the children of the said John Hobson her nephew until they should severally attain the age of twenty-one years, and as they should severally attain that age in trust to pay to each child one full and equal part or share of the said fifth part of her said estate and effects to and for his and their own use and benefit for ever. And as to, for, and concerning the other four parts of the said remaining half part of her said estate and effects, she gave and bequeathed the same unto the said James Beard and Thomas Holy, their executors, administrators, and assigns, upon trust to pay, divide, and apply the same in manner following (that was to say), one equal fourth part or share thereof unto and equally between the two children of her late nephew Edmund Hobson, deceased, another son of John Hobson, their executors, administrators, and assigns, to and for their own use and benefit for ever; another of such equal fourth parts or shares thereof unto and equally amongst the children of her niece Elizabeth, late the wife of Samuel Schofield, deceased, a daughter of John Hobson, their executors,

administrators, and assigns, to and for their own use and benefit for ever; another of such equal fourth parts or shares thereof to and for the use and benefit of her nephew Ralph Hobson, another son of John Hobson; and the remaining equal fourth part \* or share thereof to and for the use and benefit of her \* 610 niece Catherine, the wife of James Rayner, a daughter of John Hobson, during the term of their respective natural lives, by equal half-yearly payments on every the 31st day of July and 31st day of January yearly.

The will then proceeded thus: "And my will is that in case any of the said sons or daughters of my said late brother John Hobson shall happen to die before the death of my said sister Sarah Green without lawful issue, then I give and bequeath the part or share of my said estate and effects of him or her so dying without issue to the survivor of them the said Ralph Hobson and Catherine Rayner, for his or her life, subject to the aforesaid restriction respecting their original shares; and in case any of them the said Ralph Hobson and Catherine Rayner shall happen to die in the lifetime of my said sister Sarah Green, or afterwards leaving lawful issue, then the part or share of my said estate and effects of him or her so dying and leaving lawful issue shall go to and be equally divided amongst his or her children as they shall respectively attain their several and respective ages of twenty-one years, and that the interest and proceeds of their said several parts and shares shall be paid and applied by my said trustees in the maintenance, education, and bringing up of the said children respectively till they attain the said age of twenty-one years."

The testatrix's sister, Sarah Green, died on the 10th of January, 1818. Catherine Rayner survived the testatrix and Sarah Green, and had several children. One of them, Daniel Lees, who attained twenty-one, died in May, 1831, in the lifetime of his mother, who died in 1842. Upon her death the surviving trustee divided the residuary estate among the parties whom he considered entitled thereto, and on so doing paid the share of which \* Catherine Rayner was tenant for life among her children \* 611 who survived her, and who had attained twenty-one. The administratrix of Daniel Lees and her husband thereupon filed the present claim seeking payment of a share of the residuary estate.

By the decree under appeal it was declared that the plaintiffs in right of the administratrix were entitled to a distributive share

of one moiety of the residuary estate, and accounts were directed. And it was ordered that the costs of the suit up to and including the hearing be paid by the defendant, the surviving trustee.

From this decree the defendant appealed.

*Mr. Roupell* and *Mr. H. Prendergast*, for the plaintiffs, supported the decree, and cited *Hutchinson v. Stevens* (a) and *Cousins v. Schroder*. (b)

*Mr. Elmsley* and *Mr. Lewin*, for the defendant, said that the defendant in distributing the fund had acted upon the opinions of two of the most eminent counsel at the Chancery bar. (c) They contended that the construction thus put upon the will was the right one, and that at all events the defendant ought not under such circumstances to have been ordered to pay costs. They referred to *Beck v. Burn*, (d) the dicta in *Packham v. Gregory*, (e) and the cases there referred to, and *Billingsley v. Wills*. (g)

THE LORD JUSTICE KNIGHT BRUCE.—The question is, \* 612 whether a child of Catherine Rayner \* who, after the testatrix's death, died in the lifetime of Catherine Rayner, having attained twenty-one, took a vested interest in the part of the share of the residuary estate of which Catherine Rayner was tenant for life. Upon this question no doubt could have arisen if the case had simply been one of a gift to Catherine Rayner for life and after her death in the language of the will, omitting the condition of Catherine Rayner leaving lawful issue. Would the case be varied if by a separate clause the testatrix had declared that if Catherine Rayner should die without leaving issue her share should fall into the residue, or go as in case of intestacy? No one will argue that this would have caused a difference. We should be making a will and guessing away what is plain if we acceded to the argument addressed to us on behalf of the defendant. With regard to the costs, the question relates to a small

(a) 1 Kee. 240.

(b) 4 Sim. 23.

(c) Mr. (afterwards Vice-Chancellor Sir) James Parker and Mr. James Russell.

(d) 7 Beav. 492.

(e) 4 Hare, 398. See *Gundry v. Pinniger*, 1 De G., M. & G. 502.

(g) 3 Atk. 219.

share of the residuary estate, one-tenth or less. All the rest the executor has (no doubt with good motives) distributed. But he has thus precluded the persons entitled to this part from having the will construed at the expense of the general estate. I think the decree clearly right.

THE LORD JUSTICE TURNER. — I concur entirely in the construction which the Master of the Rolls has put upon this will. The first argument in support of a different construction is that the bequest to the children of Catherine Rayner being only given in the contingent event of her leaving issue, therefore only the children who were living when the contingency happened would take. That argument would go to a great extent and affect many decisions, affirming as it must the principle that where there is a gift to a class upon a contingent event, the time of the happening of the contingency determines the individuals composing the class. That is not the rule.<sup>1</sup> Another argument was \* that \* 613 there is no bequest except in the direction to pay. But Sir JAMES WIGRAM has well laid down the rule with reference to questions of this description in *Bull v. Pritchard*. (a) He there says: "There are two classes of cases, under one or the other of which the present case must fall. One class is, where the devise is to a party at a given age, and the property is given over if the devisee dies under that age. The other is, where the description of the devisee is such as to make the given age part of that description. In cases of the former class, the Court has discovered an intention expressed in the will, that the first devisee shall take all that the testator has to give, except what he has given to the devisee over; and, in order to give effect to that intention, has held, by force of the language of the will, that the first devise was not contingent, but vested, subject to be divested upon the happening of the event upon which the property is given over. *Phipps v. Akers*. (b) In the second class, the Court has held the devise contingent, upon the ground that no one could claim who could not predicate of himself that he was of the age required; that

(a) 5 Hare, 567.

(b) 9 Cl. & Fin. 583; 4 Man. & Gr. 1107; 3 Cl. & Fin. 703; 1 Sim. 44, *nom.* Phipps v. Williams.

<sup>1</sup> See 2 Jarman Wills (3d Eng. ed.), 195, 750; *Leeming v. Sherratt*, 2 Hare, 14, 23; *Lloyd v. Lloyd*, 3 K. & J. 20; *Brocklebank v. Johnson*, 20 Beav. 205.

otherwise he did not answer the entire description. *Festing v. Allen*, (a) and the cases there referred to." In this case the gift to the children in the event of the parent leaving issue is absolute upon their attaining twenty-one, and the description of the children who are to take is not qualified.

His Lordship also referred to *Halifax v. Wilson*. (b)

Appeal dismissed with costs.

1858. February 22. March 1. Before the LORDS JUSTICES.

In 1847 Joseph R. & Sons obtained an injunction to restrain N. & William R. from using the trade-mark "J. R. & Sons." Soon afterwards W. R. entered into partnership with his father John R. and with a brother, and the three used the trade-mark "J. R. & Sons," with a colourable addition. Upon the plaintiff's moving, in 1853, to commit W. R., and denying notice of the breach of the injunction before July, 1852, *held*, that they were entitled to the order, and that acquiescence, to constitute a defence to such a motion, must amount to a license to use the mark.

*Held*, also, that the plaintiffs might move to commit W. R. without bringing his partners before the Court.\*

THIS was the appeal of the plaintiffs, who carried on business at Sheffield, under the style and firm of Joseph Rodgers & Sons, from the refusal of Vice-Chancellor STUART to commit one of the defendants, William Rodgers, for an alleged breach of an injunction dated the 10th of December, 1847, and granted by the late Vice-Chancellor WIGRAM. The facts of the case to that time are stated in the sixth volume of Mr. Hare's Reports, page 325.

The injunction purported to restrain the defendants John Nowill and William Rodgers, their servants, agents, or workmen, from using the mark ("J. Rodgers & Sons," with a crown and the

(a) 12 M. & W. 279; 5 Hare, 578.

(b) 16 Ves. 168.

<sup>1</sup> S. C., 17 Jur. 171; 11 Jur. 73.

\* See *Bradley v. Norton*, 83 Conn. 157.

royal initials) mentioned in the prayer of the plaintiff's bill upon penknives, pocket knives, or other articles of cutlery, or any other mark or marks so contrived or expressed, as by colourable imitation or otherwise to represent that the penknives, pocket knives, or other articles of cutlery manufactured or sold by the defendants, were the same as the penknives, pocket knives, or other articles of cutlery manufactured by the plaintiffs.

In support of the motion for commitment before the Vice-Chancellor, one of the plaintiffs, Henry Atkin, deposed that in or about the month of June, 1852, he and \* his partners in \* 615 the firm of J. Rodgers & Sons were informed, and had for the first time reason to suspect and believe that the defendant, William Rodgers, had infringed and disobeyed, and was continuing to infringe and disobey, the injunction; that one day in or about June, 1852, a Mr. Sorby called at the place of business of the plaintiffs in Sheffield, and informed John Rodgers the younger, one of the plaintiffs, that he had purchased a considerable quantity of knives stamped with the name or mark of "J. Rodgers & Sons," from one Thomas M'Givern, a factor and general dealer in cutlery and hardware, carrying on business in Sheffield; and that Mr. Sorby had thereupon produced to John Rodgers the younger a number of penknives and pocket knives stamped on the tang of the pen blades thereof respectively with the stamp or mark of "J. Rodgers & Sons, Celebrated Cutlery," with a crown and the royal initials.

There was further evidence showing that the defendant, Wm. Rodgers, sold articles of cutlery bearing substantially the prohibited mark.

In opposition to the motion, the defendant, Wm. Rodgers, deposed that since the month of May, 1848, he had, in conjunction with his father John Rodgers, and his brother George Rodgers (and part of the time with his brother Samuel Rodgers, but who was since deceased), carried on business in copartnership at Bridge Street, in Sheffield aforesaid, under the style or firm of John Rodgers & Sons, and that during the whole of such period his firm had used and struck the marks of "John Rodgers & Sons," with a crown and the royal initials; and "J. Rodgers & Sons," with a crown and the royal initials, sometimes with the addition of the words "celebrated cutlery," or some other words of a similar character, and at other times without.

\* 616 \* John Rodgers, the father, and George Rodgers, the brother of the defendant Wm. Rodgers, deposed that for five years last past, Wm. Rodgers had never manufactured or sold any cutlery on his own account, but always on account of their firm of John Rodgers & Sons.

John Rodgers, the father of the defendant Wm. Rodgers, deposed that he had manufactured cutlery ever since the year 1821, on his own account, and afterwards in partnership with his sons George Rodgers and the defendant Wm. Rodgers, and with his son Samuel Rodgers until his death; that from the time he and his sons began to carry on business together they carried it on under the style or firm of "John Rodgers & Sons," and had so carried it on to the present time, and had used the marks, and carried on business in the manner stated and set forth in the affidavit of his son and partner Wm. Rodgers.

The nature of the other evidence in the case appears sufficiently from the judgments.

The Vice-Chancellor refused the motion on the grounds that it was made too late and after acquiescence, and that the defendant's partners were not before the Court.

*Mr. Malins* and *Mr. M. A. Shee* supported the appeal.

[The Lord Justice TURNER referred to *Croft v. Day. (a)*]

*Mr. Bacon* and *Mr. Osborne*, for the defendant Wm. Rodgers. — \* 617 \* No breach of the injunction has been committed, for the circumstances of the case have completely changed since the injunction was granted. The present firm of John Rodgers & Sons clearly have a right to the use of their own names. The plaintiffs might use their own names of Joseph Rodgers & Sons in full, and then all confusion between the firms would be at once avoided. Upon a motion to commit, a clear contempt must be established. If the plaintiffs wish to try the question whether they are entitled to restrain the firm of John Rodgers & Sons from using their own names, their proper course is to file another bill against the new firm for an injunction. But they well know that even if there ever was a pretence for such an ex-

periment, which there was not, it could not possibly succeed after the present firm has been so long in the unmolested enjoyment of the mark, and they therefore attempt to accomplish the same end by the present motion, admitting that they have been more than six months in possession of their present information. But surely if the case was not a proper one for an injunction, it cannot be a proper one for a committal, which is never ordered in a case of doubt. It would be manifestly a gross injustice to the other partners to make in their absence the order sought, which would be greatly to their prejudice, nor can the plaintiffs move to commit Wm. Rodgers while they acquiesce in the proceeding complained of as regarded his father and brother.

*Mr. Malins*, in reply, was stopped by the Court.

THE LORD JUSTICE KNIGHT BRUCE. — I think this as clear a case of contempt of an injunction as ever was brought before the Court.

The injunction in terms forbids the use of the mark "V. R." on each side of a crown, and the words \* "J. Rodgers \* 618 & Sons." That very mark, accompanied by those very words, has since the injunction been used by the defendant, who was restrained by it. With regard to the additional words, sometimes or frequently used (it is indifferent which), "celebrated cutlery," instead of varying the case or making it better, they make it, in my opinion, if possible, worse. Now, if there had been great delay on the part of the plaintiffs, after being aware, as it is suggested, of the fact, unless it amounted to a license, I am not sure that it would make the defendants' case better. But, upon the evidence, I do not believe that they were aware of it. I do not believe that if they had been aware of it, they would not have proceeded sooner as they have proceeded now.

Upon the evidence, I have no doubt whatever that this mark and these letters have been used for the purpose of increasing the sale of the defendants' cutlery by enabling or assisting them to pass it off as the cutlery of the plaintiffs.<sup>1</sup> I am of opinion, there-

<sup>1</sup> See 2 Dan. Ch. Pr. (4th Am. ed.) 1648, 1649, and cases cited in notes; *Burgess v. Burgess*, *post*, 896; 2 Story Eq. Jur. § 951 *et seq.*; *Seixo v. Provezende*, L. R. 1 Ch. Ap. 192; *Farina v. Silverlock*, 6 De G., M. & G. 214; *Merrimack Manuf. Co. v. Garner*, 4 E. D. Smith, 387;



fore, that unless a mark can be now suggested to be used in future which we shall think reasonable, there must be an order for committal.

THE LORD JUSTICE TURNER. — This case appears to me to be quite as clear as it appears to my learned brother. The injunction granted is to restrain the defendants from using a particular mark, or any other mark or marks so contrived or expressed as by colourable imitation or otherwise to represent that the penknives, pocket knives, or other articles of cutlery manufactured and sold by the defendants are the same as the penknives, pocket knives, or other articles of cutlery manufactured by the plaintiffs.

It is, however, first said on the part of the defendants \* 619 \* that the plaintiffs have abandoned the mark of "J. Rodgers & Sons," and have used a different mark: but,

upon the evidence in this case, I entertain no doubt whatever that the plaintiffs have not abandoned the mark of "J. Rodgers & Sons." For it stands thus: on the one side an affidavit says that the mark of "J. Rodgers & Sons" has been, since the injunction was granted, extensively used or usually used by the plaintiffs; and, on the other side, we have only the affidavits of two workmen, one of whom says, he made penknives for the plaintiffs for a period of four years, and has been since working for his own benefit for the period of four years more, and that he never made any for the plaintiffs with the mark "J. Rodgers & Sons;" a statement which is perfectly consistent with the fact of other people having made them for the plaintiffs with the same mark of "J. Rodgers & Sons." The other workman says: "I manufactured and worked for the plaintiffs; I never made, and I never saw made, for the plaintiffs knives with that mark upon them." That is the expression contained in this affidavit. The witness does not say that he never saw knives which had been manufactured for the plaintiffs with that mark, but that he never saw such knives made. On the balance of the evidence in this case, I entertain no doubt that the plaintiffs have used the mark of "J. Rodgers & Sons," and that there has been no abandonment of it.

Then on the question of acquiescence, I think that, in a case of *Brooklyn White Lead & Co. v. Masury*, 25 Barb. (N. Y.) 416; *Taylor v. Carpenter*, 3 Story, 458; *Emerson v. Badger*, 101 Mass. 82; *Clement v. Maddick*, 5 Jur. N. S. 592.

this description, where there has been an injunction granted by this Court, there must, in order to deprive the party who has obtained the injunction of the right to move for committal upon the breach of it, be a case made out almost amounting to such a license to the party enjoined to do the act enjoined against as would entitle him to maintain a bill against others for \* doing that act. The party enjoined must, I think, show \* 620 such acquiescence as would be sufficient to create new right in him. It is perfectly clear to my mind that in this case there has not been any such acquiescence as to entitle the defendants to set up any such right in themselves.

I am of opinion, therefore, that unless the defendant satisfies us that he intends to use and undertakes to use a particular mark, which will not interfere with the plaintiffs' marks, there must be an order for commitment.

March 1.

The case was mentioned on a subsequent day, and a mark agreed upon, which the defendant was to be at liberty to use. The defendant was ordered to pay the costs of the motion before the Vice-Chancellor.

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STANSFIELD v. HOBSON.

1853. March 2. Before the LORDS JUSTICES.

More than twenty years after a mortgagee had entered into possession the mortgagor's solicitor wrote to the mortgagee requesting to know when he could see the mortgagee upon the subject of the mortgage. The mortgagee replied by a letter, saying, "I do not see the use of a meeting unless some one is ready with the money to pay me off." *Held*, that this letter was a sufficient acknowledgment in writing to exclude the application of the Statute of Limitations, although not written within twenty years after the mortgagee had entered into possession.<sup>1</sup>

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<sup>1</sup> See *Jortin v. The South-Eastern Railway Co.*, 6 De G., M. & G. 270; *Pendleton v. Rooth*, 1 Giff. 35; 5 Jur. N. S. 840; 1 De G., F. & J. 81; 6 Jur. N. S. 182; *Morgan v. Morgan*, 10 Geo. 297; 2 Dan. Ch. Pr. (4th Am. ed.) 650, 651. But see *Cheever v. Perley*, 11 Allen, 584.

THIS was an appeal from a decree of the Master of the Rolls upon a claim for the redemption of a mortgage, and the question was whether there had been an acknowledgment in writing within the 3d and 4th Will. 4, c. 27, § 28, which provides as follows:—

That when a mortgagee shall have obtained the possession or receipt of the profits of any land, or the receipt of any rent comprised in his mortgage, the mortgagor, or any person claiming through him, shall not bring a suit to redeem the mortgage, but within twenty years next after the time at which the mortgagee obtained such possession or receipt, unless in the mean  
\* 621 \* time an acknowledgment of the title of the mortgagor, or of his right of redemption, shall have been given to the mortgagor, or some person claiming his estate, or to the agent of such mortgagor or person in writing signed by the mortgagee, or the person claiming through him; and in such case, no such suit shall be brought but within twenty years after the time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given.”

By an indenture dated the 1st of September, 1824, the plaintiff and others, the then trustees of a building society called the Union Building Club, assigned to the defendant John Hobson a plot of land and other hereditaments in Union Street, Oldham, for the residue of a term, subject to redemption on payment of 1000*l.*, and by a deed dated in March, 1825, the premises were charged with a further sum of 1000*l.*, advanced by the defendant to the plaintiff and his co-trustees. In the same year, the interest being unpaid, the defendant entered into the receipt of the rents and profits of the plot of land, and had ever since been in such receipt.

In 1852 the claim was filed in the present suit for redemption, and in opposition to it the defendant by his affidavit deposed that he had not, nor had any person on his behalf, to his knowledge or belief within twenty years next preceding the filing of the claim, given or signed any acknowledgment in writing of the alleged title of the plaintiff, or of his alleged right of redemption of or to the plot of land and premises, or any part thereof, and he disputed such alleged right and title of the plaintiff, and claimed the benefit of the Acts of Parliament of the 3 & 4 Will. 4, c. 27, the 21

James 1, c. 16, and of all other Acts of Parliament then in force for the limitation of actions and suits with respect \* to real property as a defence to the claim, in the same \* 622 manner as he would have been entitled thereto upon demurrer or plea. He further deposed that he had been informed and believed, and did not doubt but that if necessary he should be able to prove, that the only estate or interest in the plot of land and premises, or any part thereof, which the plaintiff ever had, or lawfully claimed to have, was vested in him as one of the trustees for a certain building society or partnership, composed of one hundred persons and upwards, constituted by a certain indenture or articles of partnership, dated the 6th of August, 1821, and that long previously to the filing of the claim the plaintiff had been removed from being a trustee for the society, and that other persons had been duly appointed trustees in his place, and that thereupon all the property and effects of the society theretofore vested in the plaintiff as such trustee as aforesaid, either alone or jointly with other persons, including all such equity of redemption, if any, as was then subsisting in respect of land mortgaged on behalf of the society, was transferred from the plaintiff, who thereupon ceased to have, and had not since had, any interest therein. That the defendant did not admit that any equity of redemption in the plot of land and premises mentioned in the claim, or any part thereof, was at the time of such transfer as aforesaid, and he denied that any such equity of redemption was then, subsisting in the plaintiff, or any person or persons claiming through him, or otherwise than through himself.

. In support of the claim, Mr. Radcliffe, the solicitor of the plaintiff James Stansfield, deposed that he had been instructed by the plaintiff to obtain an account of the amount owing to the defendant upon the security of the property in Union Street, Oldham, and to effect an arrangement for the payment of such amount. That in \* pursuance of, and with the view of car- \* 623 rying out such instructions, he, on the 26th of November, 1849, went over to the Rutland Arms Inn, at Bakewell, where the defendant usually resided, for the purpose of seeing him upon the subject, but then ascertained that the defendant was in Scotland, whereupon the witness wrote to the defendant a letter stating that he had called at Bakewell, intending to see the defendant on the subject of the property in Union Street, Oldham, belonging to the

Union Building Society, and requesting him to fix an appointment when the witness could see him, either in Bakewell or Manchester. That on the 2d of February, 1850, the witness wrote another letter to the defendant, requesting to know when he could see him in Bakewell or Manchester as to his claims upon the property, and that, in answer to his letter, the witness received the following letter written and signed by the defendant :—

“ Sir, — I received yours of the 2d instant. I do not see the use of a meeting either here or at Manchester, unless some party is ready with the money to pay me off.

“ I am your obedient servant,

“ JOHN HOBSON.

“ BAKEWELL, February 5, 1850.”

The witness replied as follows :—

“ OLDHAM, February 8, 1850.

“ Sir, — I have to acknowledge the receipt of your letter of the 5th instant. My clients are endeavouring to raise money to pay you off, and I shall be glad to know what is the amount now owing.

“ I am, Sir, your obedient servant,

“ HENRY RADCLIFFE.

“ John Hobson, Esq.”

\* 624 \* To this letter the defendant answered as follows :—

“ Sir, — You do not mention who your clients are ; and I have been put to so much trouble and expense by such applications, that I should like to know a little more before I make any statement.

“ I am, Sir, your obedient servant,

“ JOHN HOBSON.

“ BAKEWELL, February 10, 1850.”

That subsequently a correspondence took place between the witness and the defendant, and that on or about the 1st of May, 1850, John Chadwick, of Oldham, as the agent and rent collector of the defendant, called on the witness, and gave a verbal statement of the principal money and interest then assumed to be due

on the mortgage security, but did not furnish any further particulars of his receipts and payments. The witness subsequently wrote to Mr. Chadwick for an account, and Mr. Chadwick forwarded the letter to the defendant, who wrote thus to Mr. Chadwick: —

“Dear Sir, — I duly received yours of the 15th, enclosing a note from Mr. Radcliffe, requesting me to furnish him with the accounts. I do not wish you to do any such thing, until I know more about the business. I do not know who Mr. Radcliffe’s clients are, nor do I know that they have any thing at all to do with the Union property. I must know a good deal more before I furnish the accounts of the estate. I have not yet even mentioned the business to my solicitor, but will do so in a few days, and I will let you hear from me.

“I am yours truly,

“JOHN HOBSON.

“BALLY SHANNON, Ireland, June 22, 1850.

“Mr. John Chadwick.”

\* The Master of the Rolls made a decree for redemption. (a) \* 625

*Mr. Elmsley* and *Mr. Osborne*, for the plaintiff, contended that the decision of the Master of the Rolls was correct, and that the correspondence contained a sufficient acknowledgment to take the case out of the statutes. They cited *Trulock v. Robey*. (b)

*Mr. Roundell Palmer* and *Mr. Hamilton Humphreys*, for the appellant. — The case does not come within the exception, unless the acknowledgment is given within twenty years after the mortgagee obtained possession. That is the only effect which can be given to the words “unless in the mean time.” Moreover, the letter is not an absolute acknowledgment. There is no admission in it which is not conditional upon there being some one ready to pay the money. Nor does it acknowledge a right in any person as mortgagor. It is not enough for a person to acknowledge that he was once in the situation of a mortgagee. It is quite consistent with the enactment, that he should make such an admission, with-

(a) See 16 Beav. 236.

(b) 12 Sim. 402.

out reviving an equity actually barred. It would be unreasonable to throw an impediment in the way of the relation of mortgagor and mortgagee being restored by making it impossible for there to be any treaty between the parties, except to the certain prejudice of one of them.

They cited *Hodle v. Healey*, (a) *Morrell v. Frith*, (b) and *Haydon v. Williams*. (c)

\* 626     \* *Mr. Elmsley*, in reply, was stopped by the Court.

THE LORD JUSTICE KNIGHT BRUCE. — Perhaps we ought to feel some difficulty about this case, after the able arguments of *Mr. Palmer* and *Mr. Humphreys*. But, able as those arguments have been, it appears to me to be clear that the writer of the letter of the 5th of February acknowledges by it that he holds a redeemable estate in the property to which it relates; that is, that he holds it by way of mortgage. It is said, however, that this does not answer the requisitions of the statute, and that there is not here any acknowledgment of the title of the “mortgagor, or of the right of redemption given to the mortgagor, or some person claiming his estate, or to the agent of such mortgagor or person.” And it is contended that the right of the particular person must be acknowledged. But I think, that, according to the true construction of the letter of the 5th of February, it must be understood as acknowledging a title to redeem in the person or persons on whose behalf the letter of the 2d was written, to which the letter of the 5th was an answer. I am of opinion that the decree at the Rolls was correct, and that the appeal ought to be dismissed with costs.

THE LORD JUSTICE TURNER. — I feel little doubt upon this case. Antecedently to the 5th of February, 1850, there had been a correspondence opened upon the subject of the property which was held by Hobson as mortgagee, and which had been originally conveyed to him as mortgagee. Two letters were written between November, 1849, and February, 1850, in one of which an agent of one of the original mortgagors wrote to the mortgagee, saying

(a) 6 Madd. 181.

(b) 3 M. & W. 402.

(c) 7 Bing. 163.

that he had called to see him upon the subject of the property of the society; and in the other of which the same agent again wrote to the \* mortgagee, desiring to see him as to \* 627 his claims upon the property. In answer to that letter, Mr. Hobson wrote as follows: "Sir,—I received yours of the 2d instant. I do not see the use of a meeting either here or at Manchester, unless some party is ready with the money to pay me off." Now, even adopting *Mr. Humphreys's* view of that letter, I take it to be clear that it is an acknowledgment of a right in some one to redeem. Then it is said that it is not an acknowledgment of any right of the plaintiff's. It is, however, written to the agent of the mortgagors or one of the mortgagors; and I think the only reasonable construction which can be put upon it is, "I do not see the use of the meeting unless you or some person be ready to pay me off." But then the acknowledgment is said to be conditional upon some one being ready to pay the money. I think, however, that the letter could not mean that any one was to be ready at the moment with the money, because accounts had to be taken, and the balance ascertained. The letter, therefore, appears to me to have left it open to the mortgagor to come to this Court to have the balance ascertained upon the statement that he was ready to pay off the money. I quite concur with the opinion of the Master of the Rolls, and that of my learned brother, that the application must be dismissed with costs.

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\* HEWARD v. WHEATLEY.

\* 628

*Ex parte* WILLIAM BERNARD OGDEN, one of the Registered Public Officers of the Northumberland and Durham District Banking Company.

1853. March 3. Before the LORDS JUSTICES.

The deed of settlement of a joint-stock banking company defined the terms "shareholder" and "member" as meaning the owner of a share or interest in the capital and joint stock of the company. It provided that no benefit of survivorship should arise among the shareholders, but that the shares should be transmissible to personal representatives. But there were also provisions



that no executor as such should be a member of the company, but might elect to sell his testator's shares or constitute himself a member in the manner therein mentioned, and that the directors might forfeit the shares if the executor did not constitute himself a member. The deed provided for the payment of calls by the "shareholders." A transferee of shares, who, by his purchase-deed, had covenanted to perform the stipulations of the deed of settlement, died, and his executor took no step to become a member of the company: *Held*, that the company were entitled to prove in a suit to administer his estate as creditors in respect of a call made after the testator's death.<sup>1</sup>

The Court will not call for the assistance of a Judge of a Court of Common Law unless it entertains a reasonable doubt.<sup>2</sup>

THIS was an appeal of the Northumberland and Durham District Banking Company (by their public officer) from the dismissal by Vice-Chancellor STUART of a petition of the appellant, seeking a reference back to the Master to review his report, in an administration suit, whereby he had disallowed the claim of the appellant, on behalf of the company, to be admitted a creditor of a deceased shareholder (the testator in the cause) in respect of a call. The petition prayed in the alternative that the petitioner might be at liberty to except to the report.

<sup>1</sup> See Angell and Ames Corp. (9th ed.) § 517 *et seq.* and cases in notes; 1 Lindley Partn. (Eng. ed. 1860) 543, 870; *Fyler v. Fyler*, 2 Railway Cas. 813; *Blakesley's Case*, 13 Beav. 193; S. C., 3 M'N. & G. 726; *Wills v. Murray*, 4 Exch. 843; *Henderson v. Gilchrist*, 17 Jur. 570, V. C. K. Calls made before the death of the testator are payable out of his estate. *Fyler v. Fyler*, 2 Railway Cas. 813; *In re Agriculturist Cattle Ins. Co.*, L. R. 5 Ch. Ap. 725; *Cork and Bandon Railway Co. v. Goode*, 13 C. B. 826. Calls made after his death are also payable out of his estate, if they are made while he continues the registered owner of the shares, and if he entered into any contract whereby he undertook to pay such calls as might be made upon his shares. *Fyler v. Fyler*, 2 Railway Cas. 813; *Wills v. Murray*, 4 Exch. 843; *Blount v. Hopkins*, 7 Sim. 51.

<sup>2</sup> The course of practice in regard to calling for the assistance of the Judges of the Common Law Courts has been changed, by 25 & 26 Vict. c. 42, §§ 1, 2; 21 & 22 Vict. c. 27, §§ 3, 6. So that now, whenever any relief or remedy within the jurisdiction of the Court of Chancery is sought in any cause or matter, and whether the title to such relief or remedy be or be not incident to or dependent upon a legal right, every question of law or fact, cognizable in a Court of Common Law, on the determination of which the title to such relief or remedy depends, is to be determined by or before the Court of Chancery, with or without a special or common jury, except under special circumstances. 2 Dan. Ch. Pr. (4th Am. ed.) 1071 *et seq.* and cases in notes. For summary of the former practice, see *Fernie v. Young*, L. R. 1 H. L. 78; 12 Jur. N. S. 441, *per Lord WESTBURY*; 2 Dan. Ch. Pr. (4th Am. ed.) 1072, 1073 in note.

The Northumberland and Durham District Banking Company was established in the year 1836 under the provisions of the Act of the 7 George 4, c. 46, and subject to the provisions of a deed of settlement, a recital in which declared that in the construction of it whenever the expressions "shareholders" and "members" were \* used they should be respectively held to mean \* 629 proprietors or owners of shares or of an interest in the capital and joint stock for the time being of the company.

The following were the material clauses :—

8. That the names and places of abode of the shareholders of the company, together with the number of shares held by each of them, shall from time to time be entered and written in a book, to be provided for that purpose by the said copartnership, called the "Shareholders' Register," which book shall be kept at the said head-office or bank in Newcastle-upon-Tyne aforesaid: and for the greater certainty of keeping the before-mentioned register every shareholder who shall at any time change his name or place of abode, or being a female shall marry, and the assignees of every shareholder who shall become bankrupt or insolvent, and the personal representatives or legatees of any shareholder who shall die, shall, as soon as conveniently may be after any such change, marriage, death, bankruptcy, or insolvency, respectively deliver or leave at the banking-house of the said company, in Newcastle-upon-Tyne, a notice in writing specifying, in the case of such change as aforesaid, his, her, or their name or names, or new name or names, and place or places of abode; and when a female shareholder shall have been married, then the name and place of abode of her husband; and in cases of death, bankruptcy, or insolvency, the names and residences of such personal representatives or legatees and assignees respectively. Provided nevertheless that, previously to the entry in the shareholders' register of the name of any person as a new proprietor of any share or shares in the capital of the company, it shall not be necessary for the board of directors to inquire whether such share or shares hath or have been effectually vested in such persons \* or not, it \* 630 being the true intent and meaning of these presents that if the name of any person should have been registered in the shareholders' register as a proprietor of any share or shares, such person shall (as between him and the proprietors for the time

being of the company) be a proprietor of the company to all purposes in respect of such share or shares and all claims which the last proprietor of such share or shares, or any person or persons claiming by, from, or under him, may have on the same, shall be wholly and exclusively upon or against the new proprietors of such share or shares, or his executors or administrators; and, further, that the shareholders' register shall, as between the company and any person claiming to be a proprietor in respect of any share or shares, be conclusive evidence on behalf of the company to show whether he is a proprietor of the company in respect of such share or shares; but neither the shareholders' register, nor any other books, documents, or writings in the custody or possession of the directors or other officers of the company, shall be deemed, construed, or taken as the evidence of the title of any proprietor to his share or shares in the capital of the company as between him and any other person or persons claiming to be entitled to such share or shares.

11. That the person in whose name any shares in the said bank shall stand in the shareholders' register herein directed to be kept, shall to all intents and purposes whatsoever within the meaning of the deed of settlement be deemed at law and in equity the absolute, sole, and beneficial holder and proprietor of such shares, and shall as such be the only person known to or recognized by the company in all votes, transfers, notices, payments, receipts, and other matters relating to the same shares; and the company shall not in any case be bound to notice or be affected by or with

\* 631 express notice of any \* trust or equitable charge imposed on any shares, or by or with any gift thereof by way of legacy until the legatee shall have become a shareholder as hereinafter mentioned.

12. That no benefit of survivorship shall arise or take place amongst the shareholders in the said copartnership bank; and all the property of the company, as between the shareholders thereof and as between their respective real and personal representatives, shall always be considered and deemed to be personal estate, so that each and every of the shareholders shall as between and among themselves have a distinct and separate right to his shares in the capital or joint stock of the company, and the same shall be vested in him to and for all intents and purposes, and subject to his disposition by deed or will or in case of intestacy be transmis-

sible to his personal representatives as part of his personal estate, and distributable accordingly, but under and subject to such provisions in the deed of settlement as shall for the time being affect such shares, and also to his proportion of profits and losses as next hereinafter mentioned.

13. That each shareholder shall be entitled to and interested in the profits, and be liable and subject to the losses of the company in proportion to his shares in the capital fund or joint stock thereof.

16. That every shareholder immediately on his admission into the company shall pay to the stock thereof the sum of one shilling in respect of every share by him taken or subscribed for, to be applied towards the expenses of instituting the company; and shall also pay into the hands of the directors at the banking-house of the company in Newcastle-upon-Tyne, to the stock thereof, an instalment of 2*l.* 10*s.* in respect of every such share, and in part of the said sum of 10*l.* of which such shares \* respec- \* 632  
tively consist, on or before the day of the date of these presents; and shall also pay unto the said directors at the place aforesaid the further instalment of 2*l.* 10*s.* in respect of every such share on or before the 10th day of August now next ensuing, and the directors shall have full power in the name of one of the public officers of the company to sue for and recover the amount so called, and also interest thereon at the rate of 5*l.* per cent per annum on such instalments from the time or respective times of their becoming due until the same shall be fully paid.

17. That in addition to the payments aforesaid amounting to 5*l.* per share, required to be made by each shareholder under the provisions lastly hereinbefore contained, the directors of the said bank for the time being shall have full power from time to time or at any time to call for and require the payment by each and every shareholder of the further sum of 5*l.* in respect of every share held by him in the said copartnership bank, either in one sum or by such instalments, and at such time or times, as they, the said directors, shall think fit, together with interest thereon after the rate of 5*l.* per cent per annum from the time or respective times appointed for payment thereof until the same shall be fully paid; provided always that notice in writing of every such call expressing the time and place when and where every payment is required to be made, and stating the substance of the provision next here-

inafter contained, so far as the same relates to the forfeiture of shares for the non-payment of calls, be given to every shareholder two calendar months at the least before the time appointed for payment of any such call ; and the directors shall have full power in the name or names of any of the registered public officer or officers of the company to sue for and recover the amount of every

\* 633 or any such call and \* interest thereon from every person refusing or neglecting to pay the same as aforesaid, and also, if they shall think proper, to enforce the forfeiture of the shares held by every person so refusing or neglecting in pursuance of the two provisions next hereinafter contained, or to adopt either or both of such proceedings at their discretion.

23. That the board of directors of the said copartnership bank shall prescribe the form of the transfers of shares therein, and have power from time to time to make such regulations respecting the preparation, custody, and registration of the instrument to be made and executed upon the sale and transfer of shares as shall appear to them necessary and advisable for the security of the company and the due assignment of the said shares ; and all sales and transfers of any shares not made conformably to the provisions of the deed of settlement, and according to the regulations of the board of directors, shall be invalid at law and in equity ; and every purchaser or transferee of shares shall, in respect thereof, when required by the directors, execute these presents, or some supplemental deed, or deed of accession thereto, to be prepared for the purpose by the board of directors, whereby he may enter into covenants with the trustees, or the public officers of the company for the time being, duly to observe and abide by all the stipulations, provisions, and regulations for the time being affecting or intended to affect the holders of shares in this company ; provided that the fees to be paid to the officers of the company for preparing, registering, and perfecting every such transfer shall not exceed one shilling per share on the shares transferred, exclusive of stamp duties, postages, and carriage of parcels.

\* 634 \* 25. That whenever, by any means whatsoever authorized by these presents, any shares in the said copartnership bank shall become actually forfeited, or shall be duly and effectually transferred to or vested in a new holder, and such new holder shall have qualified himself to hold and retain the same, then and in such case, and not before, the future responsibility of the

previous holder as a member of the company in respect of such shares shall (so far as the law will in that behalf allow) cease and determine, and such previous holder, and all persons claiming by, from, or under him, shall be exonerated and released from all subsequent claims, demands, liabilities, and obligations in respect of the same shares, and from all future observance and performance of the covenants, conditions, stipulations, and agreements in these presents, or any supplementary deed or deed of accession thereto, respectively contained or referred to in respect of the same shares; provided, nevertheless, that nothing in this present article contained shall extend or be construed to extend to release the previous holder of shares so forfeited or transferred as aforesaid from his proportion of the losses (if any) sustained by the company up to the period of his ceasing to be such holder as aforesaid.

27. That the husband of any female shareholder, or the executor, administrator, or legatee of any deceased shareholder, or the assignee of any bankrupt or insolvent debtor, possessed of shares, shall not be a member of the company in respect of such shares as shall be vested in him in any of the aforesaid capacities respectively; but such assignee of a bankrupt or insolvent debtor shall sell and dispose of such shares in manner and subject to the provisions hereinbefore expressed and contained with respect to the sale and transfer of shares; and any such husband, executor, administrator, or legatee \* as aforesaid, shall be at liberty either to \* 635 sell and dispose of the shares so vested in him in like manner and subject as aforesaid, or at his option to become a member of the company in respect of such shares on complying with the provisions of these presents as next hereinafter in that behalf expressed.

28. That the husband of any female shareholder, or the executor, administrator, or legatee of a deceased shareholder, who shall be desirous of becoming a member of the company in respect of the shares vested in him in any of such capacities respectively, shall give seven days' notice in writing to the board of directors, at the banking-house of the company, in Newcastle-upon-Tyne, of such his desire to become a member as aforesaid, in which notice shall be expressed the name and place of abode of the person giving the same, and the name of the shareholder in whose place or right he claims, and the number of shares in respect whereof he is desirous of becoming a member; whereupon, and upon otherwise com-

plying with the provisions of these presents, or any supplementary deed or deed of accession thereto, he shall be admitted and become a member of the company in respect of such shares, and have the same transferred into his name accordingly, and shall stand and be personally charged with the duties and liabilities incident to the ownership of the same.

29. That the husband of any female shareholder, or the executor, administrator, or legatee of any deceased shareholder, who shall not, under the provision lastly hereinbefore contained, elect to become a member of the company in respect of the shares vested in him in any such capacity, and also the assignee of every bankrupt or insolvent debtor possessing shares, shall be entitled

\* 636 to receive any dividend which shall have become \* due on the shares so vested in him in any such capacity as aforesaid, before his title to the same shares accrued; but no dividends which shall become due on the same shares after his title shall have accrued shall be payable to or demandable by him; but shall, till some person shall have become a member of the company in respect of the same shares, remain in suspense, and shall not be paid till the transfer thereof shall be completed, and the new holder thereof shall claim the same, and every sale or transfer of such shares shall carry with it and entitle the purchaser thereof to the dividends, profits, and interest, and share of capital and surplus, or guarantee fund in respect of the shares transferred, so as to close all the right and interest of the party or parties making such transfer in respect of such transferred shares.

30. That in case any person in whom any shares shall by original subscription, purchase, marriage, bequest, representation, or other mode of acquisition become vested, and who shall not have executed these presents or some supplementary deed, or deed of accession thereto, shall, for six calendar months after notice in writing for that purpose, neglect or refuse to execute the same deed respectively, it shall be lawful for the board of directors to declare the shares so vested in such person so neglecting or refusing, and all instalments paid thereon, and all benefit and advantage, dividends and profits, whatsoever in respect thereof, or incident thereto, to be forfeited to the company for the benefit and use of the continuing shareholders therein, and the same shall be forfeited accordingly.

32. That every person in whom any shares shall vest by transfer

or otherwise, and who previously to such vesting shall have executed the deed of settlement, and \* who shall be a mem- \* 637  
ber of the company to all purposes in respect of any other shares, shall, as to all shares so vesting in him as aforesaid, be considered as a member from the date of the transfer to him, or from the time of leaving his title to such shares in the banking-house of the company, or proving and establishing it as aforesaid, and shall not be required, nor shall it be necessary for him again, to execute the deed of settlement.

105. That in every case in which any notice is by these presents directed to be given or sent to the shareholders, or any of them, or any meeting of the company is required or authorized to be convened, the same shall, unless otherwise expressed or provided for, be given, sent, or convened by a written or printed letter signed by the general manager, or such other officer for the time being of the company as the board of directors shall appoint in that behalf, and every such letter shall be directed to the person or persons to whom the same is or are to be given or sent at his or their place or places of abode, as stated in the shareholders' register, pursuant to the directions hereinbefore given, and shall be forwarded through the post-office, and shall as between the parties to these presents, or any supplementary deed thereto, be fully effective for all purposes for which such notice is required to be given or sent, although the same shall not, after being committed to such post-office, reach the place of destination of such notice, and such notices shall be conclusive on every party to whom they shall be directed, and all parties claiming under them, and every such notice shall to all intents and purposes be considered to have been given to the party to whom the same shall have been directed on the day on which the same shall be committed to the post-office as aforesaid.

110. And further, each and every of them, the said \* sev- \* 638  
eral persons, parties hereto of the first, second, third, and fourth parts severally, separately, and apart from the others or other of them, doth hereby for himself and herself respectively, and his and her respective heirs, executors, and administrators, and as to and concerning only the acts, deeds, and defaults of himself or herself, and his or her heirs, executors, and administrators, covenant, declare, and agree with and to each other, and with and to the said Wm. Backhouse the younger and Thos.



Mounsey, and their respective executors and administrators, that he or she, the covenantors respectively, shall and will for and in respect of the share and shares by him or her originally or newly acquired in the capital of this company, being and remaining part of the assets of the covenantors, observe, perform, fulfil, and keep all the covenants, articles, clauses, stipulations, and agreements (including additions, alterations, variations, and modifications to be made in pursuance of the provisions hereinbefore contained), which are or ought to be observed, performed, fulfilled, and kept by him or her, the covenantor, or his or her heirs, executors, or administrators respectively, in respect of or in relation to such share or shares respectively so for the time being remaining part of his or her assets, and according to the true intent and meaning of the same covenants, articles, clauses, stipulations, and agreements respectively, and that the covenantor will perform all the duties of a director, auditor, or trustee of the company, from time to time, when and so long as he shall be appointed to and accept such office according to the directions, stipulations, and agreements herein contained, and that the damages and costs which may be recovered from time to time under this covenant shall be paid over to the said board of directors, and be paid over by them for the benefit of any individual or individuals entitled thereto,

and if no person or persons shall be entitled thereto,  
 \*639 \* then the same shall be applied by the directors as part of the assets of the company, and added to the capital of the same, and belong to the shareholders thereof respectively.

On or before the 5th of February, 1842, Charles Bragg, of Newcastle-upon-Tyne, was the registered proprietor and holder of 150 original shares, upon which 5*l.* per share (being the amount of the two first calls of 2*l.* 10*s.* each) had been paid up.

On the 5th of February, 1842, Mr. Bragg gave notice, according to the terms of the deed of settlement, that he had agreed to sell to the testator, Joseph Elder, five shares and 145 shares held by him in the capital stock of the company, at the price of 8*l.* 5*s.* per share, and requested that the same might be transferred into the testator's name, and the testator duly signed, at the foot of the notices, a consent to become the purchaser and proprietor of the shares, subject to the rules and regulations of the company.

The five shares were transferred to the testator by an indenture, dated the 5th of February, 1842, and made between Mr. Bragg of

the first part, the testator of the second part, and William Backhouse the younger and Thomas Mounsey, as trustees of the company, of the third part, and thereby Mr. Bragg, in consideration of 41l. 5s. to him paid by the testator, granted, assigned, and transferred to the testator, his executors, administrators, and assigns, all those five shares of him, Charles Bragg, of and in the capital stock of the company, then standing in his name in the books thereof, with all dividends, interest, profits, proceeds, benefits, and advantages, incident to or arising from the shares, to hold unto the testator, his executors, administrators, or assigns, subject \* to the covenants, provisos, declarations, articles, stipulations, regulations, and agreements contained in the said or any future or supplemental subsisting deed of settlement of the company. And the testator, for himself and his heirs, executors, and administrators, covenanted with William Backhouse the younger and Thomas Mounsey, their successors, executors, administrators, and assigns, that he, the testator, would from time to time, and at all times thereafter, in respect of the shares thereby assigned, pay all instalments and sums of money then due, or thereafter to become due, thereon, and also perform, fulfil, and keep all and every the covenants, stipulations, provisions, and regulations for the time being, affecting, or intending to affect, holders of shares in the company. \* 640

The deed was executed by Charles Bragg and the testator. In the margin of it, a consent to the transfer was signed by two of the directors of the banking company (as required by the deed of settlement). With respect to the other 145 shares, a consent to the transfer of them from Mr. Bragg to the testator was duly signed by two of the directors of the company in the margin of the notice. And shortly after the execution of the two notices, and of the deed of transfer, the 150 shares were transferred in the shareholders' registry book of the company from the name of Mr. Bragg into the name of the testator, in whose name the same had ever since been and still were standing.

On the 24th of February, 1846, the testator purchased from one Richard Pengilly 100 more shares, which were duly transferred in the shareholders' registry book from the name of Richard Pengilly into the name of the testator, in whose name the same had ever since been and still were standing.

\* From the times when the testator became possessed of \* 641

the 250 shares to the day of his death, he regularly received the dividends thereon.

On the 8th of December, 1847, the testator died.

Shortly afterwards, an administration suit was instituted by the residuary legatee against the testator's executors.

On the 1st of September, 1848, a call of 5*l.* was duly made in respect of every share held in the bank on the proprietors of shares, and a notice dated sixth of the same month was served upon each of the proprietors of shares in the company to pay the call.

By the decree in the cause made on the 22d of December, 1848, the usual reference was directed to the Master to take an account of the testator's debts. Under this decree, the appellant claimed to prove for 1250*l.*, being the amount of the call of 5*l.* upon the testator's shares.

On the 30th of April, 1849, the petitioner's claim came on for hearing before Master DOWDESWELL, who reserved judgment, and on the 9th of May following allowed the claim. The case was afterwards reargued before Master HUMPHRY, the successor of Master DOWDESWELL, and the claim was disallowed; whereupon the appellant presented the petition from the dismissal of which he now appealed.

A preliminary objection was taken to the form of the application by way of petition, but was waived.

*Mr. Malins* and *Mr. Toller* supported the appeal.

\* 642     \* *Mr. Lee* and *Mr. Hislop Clarke*, for the plaintiff (the residuary legatee), opposed it.

*Mr. W. D. Lewis* also opposed it on behalf of the executors.

The nature of the arguments appears sufficiently from the judgments.

The following cases were referred to: *Hay v. Willoughby*, (a) *Gouthwaite's Case*, (b) *Tanner's Case*, (c) *Straffon's Executors'*

(a) 10 Hare, 242.

(b) 3 De G. & Sm. 258; 3 M. & G. 187.

(c) 5 De G. & Sm. 182.

*Case, (a) Crosfield's Case, (b) Birkenhead, Lancashire, and Cheshire Railway Company v. Cotesworth, (c) Greenwood v. Taylor, (d) Mason v. Bogg, (e) Ness v. Armstrong, (g) Ness v. Angas. (h)*

THE LORD JUSTICE TURNER. — This was a petition presented by the registered public officer of the Northumberland and Durham District Banking Company praying that the Master might review his report, by which he found that the petitioner was not a creditor of the estate of Mr. Josh. Elder, and the petition was dismissed by the Vice-Chancellor. It is to be observed that the case does not come before the Court in its regular course; and I make the observation because it is very inconvenient to have matters of this description brought before the Court by petition, instead of the ordinary form in which such matters have been hitherto brought under its consideration.

\* The first question is how the claim which the petitioner \* 643 asserts against the estate of Josh. Elder has arisen. It appears that a banking company was established by a deed of settlement of the 1st July, 1836, to some of the provisions of which it will be necessary hereafter to refer. On the 8th February, 1842, the testator, Mr. Elder, purchased 150 shares in the company, of which five shares were transferred to him by a deed stated in the petition to have been made between the owner of the shares, Mr. Bragg, of the first part, the testator of the second part, and Mr. Backhouse, Jr., and Mr. Mounsey, the trustees of the banking company, of the third part, and by which deed Mr. Bragg, in consideration of 41*l.* 5*s.* paid by Elder, assigned five shares in the capital stock of the company to Elder, "subject to the covenants, provisions, declarations, and agreements contained in the said or any future or supplemental subsisting deed of settlement of the said company," and Elder by that deed covenanted with Backhouse and Mounsey, the trustees of the company, that he, Elder, would from time to time, and at all times thereafter, in respect of the said shares thereby assigned, pay all instalments and sums of money then due or thereafter to become due thereon, and also per-

(a) 4 De G. & Sm. 256; 1 De G., M. & G. 576.

(b) 4 De G. & Sm. 338; 2 De G., M. & G. 128.

(c) 5 Exch. 226.

(e) 2 M. & C. 443.

(h) 3 Exch. 805.

(d) 1 Russ. & M. 185.

(g) 4 Exch. 21.

form, fulfil, and keep all and every the covenants, provisions, and regulations for the time being affecting or intended to affect holders of shares in the said company. That instrument operated as a transfer of five shares in the company, and it contained a covenant by Mr. Elder to observe the provisions of the deed of settlement, so far as respected those five shares. The remaining 145 of the 150 purchased by Elder were not transferred to him by deed, but (in conformity, as I presume, with the usual course of the company's proceedings) the vendor Bragg gave notice that he had agreed to sell to Elder the 145 shares at so much per share,

\* 644 and requested that they might \* be transferred to the name of Mr. Elder, who signed his consent to become the purchaser and proprietor of those shares, subject to the rules and regulations of the banking company then existing, and the notice having been assented to by a memorandum signed at the foot thereof by two of the directors of the banking company, the 145 shares were transferred into Mr. Elder's name. A similar transaction afterwards took place in February, 1846, by which Mr. Elder purchased of another party 100 more shares, and he was entered on the register as holder of all these shares, and received the dividends upon them up to the time of his death, which occurred on the 8th December, 1847. A call of 5*l.* upon those shares was made in September, 1848, and the question now arises whether his estate is liable for that call.

It is first said on the part of the respondents that Elder never did, in fact, become a shareholder in this concern. That point was raised by *Mr. Clarke* in his argument, and was rested on the 23d and 32d articles of the deed.

[His Lordship read these clauses, and then proceeded.]

The regulations of this company, therefore, so far as they appear before us, do not absolutely require the execution of a deed for the purpose of constituting a purchaser of shares the owner of the purchased shares; for the words of the 23d clause are, "and every purchaser or transferee of shares shall, in respect thereof, when required by the directors, execute these presents or some supplementary deed." It is not therefore, as it seems to me, incumbent on a purchaser of shares to execute a deed until he be required to do so. From all that can be collected (and nothing has been said

to the contrary), the course taken in the present case \* is one that has been adopted in all other cases of transfers \* 645 of shares. The transfer is taken upon a limited number of shares, and the transferee becomes registered owner of the other shares, which are not the subject of a deed of transfer. Mr. Elder, therefore, must be considered to have become the owner of these shares.

But then it is argued that assuming Mr. Elder to have become the owner of the shares, his executors are not liable in respect of the call which was made after his death, and *Mr. Lewis* has rightly directed our attention on this point to *Gouthwaite's Case*.<sup>(a)</sup> However, I take it to be clear that every executor must be liable upon the contracts which have been entered into by his testator, whether the words executors or administrators are contained in the contract or not; and the question therefore is, whether upon the contract entered into by the testator he did or did not contract for the payment of the 5*l.* per share called after his death. Now the liability in this respect depends upon the 17th article of this deed. It appears that on the company being formed there was 2*l.* 10*s.* to be paid in the first instance, on the deed being prepared, and 2*l.* 10*s.* more within a limited time, making 5*l.* per share; and as to the remaining 5*l.* the deed contained this provision.

[His Lordship read the 17th article.]

It was said, in the course of the argument, that the proper course to have been taken by the directors of the company was to have enforced the forfeiture of the shares. But the power given under this clause to the directors is to sue for the calls, and also, if they shall think fit (and not otherwise), to enforce the forfeiture of the shares. \* It was therefore not imperative \* 646 upon the directors to enforce the forfeiture.

Another argument was, that the power given by the deed is to call for and require payment by each and every shareholder, and that the deed requires notice to be given to each shareholder, with which requisition it was not possible to comply, because Mr. Elder (being dead) was not a shareholder when the call was made. But this depends upon the meaning of the term "shareholder" in the

(a) 3 De G. & S. 258; 3 M. & G. 187.

deed. And the definition which the deed gives of the term is this: "Whenever the expressions 'shareholders' and 'members' are used, they shall respectively be held to mean proprietors or owners of shares or of an interest in the capital and joint stock for the time being of the said copartnership bank."

It was attempted to meet this difficulty by saying that the executors were not proprietors or owners of any share or interest in the company, and the 27th article of the deed of settlement was relied upon.

[His Lordship read it.]

Now it is true that this article provides that the executors shall not be members of the company except under certain conditions; but when we examine the other provisions of the deed we see that an executor of a deceased shareholder is contemplated throughout the deed as being the holder of the shares in the company, though he is placed in the position of not having all the rights which belong to an owner of shares. The vesting of the shares in him is in terms spoken of as a consequence of the death of his testator. It is indeed the necessary effect of the contract unless there be some stipulation to the contrary. The shares are part of  
 \* 647 the personal estate of the testator at the time \* of his death.

By law they vest in the executors unless the contract be such that the interest of the testator and that of his estate is destroyed by his death, or unless the deed has provided that the usual legal consequences of the contract shall not take place. The deed might perhaps have excluded the application of the general rule of law by providing that there should be no interest passing to the executor. But has it done so? It is clear that it has not, because the 12th article provides that there shall be no right of survivorship.

[His Lordship read it.]

It is clear, therefore, that this deed does not exclude the application of the general law that the shares shall vest in the executors; but on the contrary provides that the shares shall vest in the executors or administrators of each testator or intestate who shall die proprietor of a share in the concern.

It has been argued that the decisions which have been cited as to contributories under the Joint-stock Companies Winding-up Acts, do not apply to the present case, because in the cases in which those decisions were pronounced the executors had done some acts creating a liability.

But in *Straffon's Executors' Case* the question of liability depended on the deed itself; for the executors had done no act whatever to vest the shares in themselves, or render themselves liable as partners *ultra* the deed; yet Lord St. LEONARDS, without difficulty, held that they were to be considered as shareholders in the concern.

*Ness v. Armstrong* (a) and *Ness v. Angas* (b) have \* also been referred to; but Lord St. LEONARDS, in deliver- \* 648 ing his judgment in *Straffon's Executors' Case*, (c) speaks thus of those cases: "Those cases, however, are also distinguishable; they depend upon a particular Act of Parliament, which, though referring to equitable as well as legal liabilities, does not furnish any particular remedy for equitable liabilities; and, therefore, a man cannot be proceeded against by a *scire facias* under the particular provision of that Act, unless it can be shown that he is legally liable as a member." I think the distinction thus laid down perfectly well founded.

We have been very much pressed, upon the part of the respondents, to suspend our decision upon the case until we should have the assistance of a common law Judge upon the subject. No doubt the power given us by the Act of Parliament to call in such assistance is of great value; but, at the same time, it is the duty, I think, of this Court, not to call in the aid of common law Judges unless there is reasonable doubt upon the point raised for consideration. I cannot say that in this case I have any doubt, and my learned brother entirely concurs with me. The order therefore must be reversed, and the Master must review his report.

THE LORD JUSTICE KNIGHT BRUCE. — I concur in what has been said. There must be a declaration that the petitioner has a claim upon the estate of the testator in respect of the call in the petition mentioned, and with that declaration the matter must be referred back to the Master to review his report.

(a) 4 Exch. 21. (b) 3 Exch. 805. (c) 1 De G., M. & G. 589.



1853. March 7. Before the Lords Justices.

A testator gave his residuary real and personal estate upon trust for his wife for life, and after her death upon trusts for the testator's issue, with executory trusts for his sister and her issue, and in default of such issue of himself and his said sister, "or upon their total extinction under twenty-one years old," he bequeathed the said residuary estate unto his first cousins by the mother's side, and the issue of such of them as might happen to be dead *per stirpes*, and to their heirs, executors, administrators, and assigns for ever as tenants in common, and not as joint tenants: " *Held*, —

1. That the gift to the cousins was not too remote.<sup>1</sup>
2. That it was not a gift to a class to be ascertained at a future period, but that the first cousins *ex parte materna* living at the testator's death took vested interests liable to be divested to the extent required to let in other first cousins born before the period of distribution.<sup>2</sup>
3. That the shares of first cousins who died before the period of distribution, leaving no issue, were not divested, but went to their real and personal representatives.<sup>3</sup>
4. That the share of a first cousin who died before the period of distribution, leaving children, went to those children.

THE question in this case, which came on to be heard originally before their Lordships, turned upon the construction of the will of Robert Henshaw dated 17th May, 1779, which (after devising and bequeathing the testator's real and personal estate to trustees, upon trust for his wife Mary Henshaw for life, subject to certain trusts for raising portions for his children) proceeded as follows: "And from and after the death of my said wife, I give, devise, and bequeath all and singular the said messuages, lands tenements, hereditaments, and premises, real and personal estate, whatsoever and wheresoever, and every part thereof, unto such of my children as shall be then living, and the issue of such of them as may happen to be dead, in such parts, shares, and proportions as my said wife, if living, shall, by any deed, &c., give, limit, direct, or appoint the same; and for want of such deed, will, or appointment, then in trust for my said children, equally to be

(a) *Ex relatione* Mr. Cadman Jones.

<sup>1</sup> See *Stuart v. Cockerell*, L. R. 5 Ch. Ap. 713.

<sup>2</sup> 2 *Jarman Wills* (3d Eng. ed.), 143, 144.

<sup>3</sup> 2 *Jarman Wills* (3d Eng. ed.), 144.

divided between them, share and share alike, as tenants in common, and not as joint tenants, and *per stirpes* and not *per capita*. But in case \* I shall have no child or children \* 650 living at the time of my decease, or in case they shall all die before attaining their respective ages of twenty-one years, then I give unto my said wife, Mary Henshaw, the sum of 2000*l.* absolutely to her own use; and I also give, devise, and bequeath the same messuages, lands, tenements, hereditaments, and premises, real and personal, and every part thereof, to my said wife, Mary Henshaw, and her assigns, for and during the term of her natural life; and from and after her death I give, devise, and bequeath the same, and every part thereof, unto and to the use of my sister, Elizabeth Henshaw, and to such of the issue of her body lawfully to be begotten as she shall by deed or will give the same unto; and in default of such appointment, then share and share alike, *per stirpes*, and not *per capita*, and to their issue; and in default of such issue as aforesaid of myself and my said sister, or upon their total extinction under twenty-one years old, I give, devise, and bequeath the same and every part thereof unto my first cousins by my mother's side, and the issue of such of them as may happen to be dead, *per stirpes*, and to their heirs, executors, administrators, and assigns for ever, as tenants in common, and not as joint tenants, subject to and chargeable with the several legacies and sums of money hereinafter given." The testator then gave legacies to his wife's two brothers and three sisters (who, with the testator's wife, were all first cousins of the testator by his mother's side), and declared that the legacies were given upon a condition thus expressed, "that I and my said sister, Elizabeth Henshaw, shall both die without issue; for in case I or my said sister shall leave any issue behind me or her at the time of our respective deaths, or in *ventre sa mère*, who shall live to attain the age of twenty-one years, then I revoke and make void all and every the said last-mentioned legacies and sums of money."

\* The testator died in 1781, leaving no issue. His sister, \* 651 Elizabeth Henshaw, died in 1800, unmarried. The testator's widow died in 1834.

The testator had at his death fourteen first cousins on his mother's side, of whom his wife was one. No first cousin was born after his death. Three of them died without issue in the lifetime of his sister; seven more died without issue in the lifetime of

the widow; another, Mrs. Spilsbury, died in the widow's lifetime, leaving children; and the other two survived the widow. The plaintiffs had purchased the interests of the two cousins who survived the widow, and of the children of Mrs. Spilsbury, and they now claimed the whole residuary estate. The Attorney-General was made a party, because the heir-at-law could not be found.

*Mr. Rolt and Mr. Sidney Smith*, for the plaintiffs. — The question is, whether the class is to be ascertained at the death of the testator, or of his sister, or of the widow. We contend that the gift is to the first cousins who are living at the death of the widow, and the issue of such first cousins as died before that time leaving issue. It may be that this is not the rule of construction as to a gift to children; but the rule in that case only applies where the testator shows, by the form of his gift, that he has in view the parental relation. It would be very inconvenient to apply the same rule to a numerous and remote class like cousins, comprehending a number of families. The cases as to next of kin depend on the fact that "next of kin" is a technical expression, which, like "heirs of the body," needs a strong context to control it. Here there is nothing to control the natural meaning of the words which naturally apply to a class to be ascertained at the period of distribution. \* 652 *Miller v. Eaton*, (a) *Butler v. Bushnell*. (b)

This would be the sound construction, if the gift had ended with "first cousins on my mother's side;" but the words which follow and refer to the death of cousins in the widow's lifetime leave no doubt upon it.

*Mr. Malins and Mr. Baggallay*, for the parties claiming under several of the cousins who died in the widow's lifetime. — Where there is a gift to one for life, then to a class, the general rule is, that all persons answering to the description of the class at the testator's death take vested interests. The fact that the gift to the class is contingent does not alter the rule. *Bird v. Luckie*, (c) *Stert v. Platel*, (d) *Gundry v. Pinniger*. (e) The construction contended for by the plaintiffs is inconvenient, as it would make

(a) Cooper, 272.

(b) 3 M. & K. 232.

(c) 8 Hare, 301; and see *Philps v. Evans*, 4 De G. & Sm. 188.

(d) 5 Bing. N. C. 434.

(e) 1 De G., M. & G. 502; and see *Boulton v. Beard*, *ante*, p. 608.

the gift contingent till the widow's death. There are no words in the gift pointing to the ascertainment of a class at a future period. When the testator meant that, he said so, as in the gift to his own children. The limitation to the issue is intended to guard against lapse, and is merely substitutionary.

*Mr. H. Cadman Jones*, for the personal representative of two cousins who died without issue in the widow's lifetime, and one of whom survived the sister. — The first part of the clause taken alone would *prima facie* give vested interests to all cousins living at the \* testator's death. *Middleton v. Messenger*, (a) \* 653 a case in which the argument of inconvenience urged by the plaintiffs, would apply as much as here. That the gift is to take effect on a contingency, does not alter the rule. *Bird v. Luckie*. (b) Then, do the words as to issue alter it? They cannot do so; for "them" is referential, and shows that the parents of the issue who were to take were themselves included in the objects of the gift. In *Gray v. Garman*, (c) there were similar words of reference. The gift to the issue is substitutionary; and, there being no issue, the original gift remains undivested. *Hervey v. M'Laughlin*, (d) *Salisbury v. Petty*. (e) If, however, the class is to be ascertained in future, it should be at the death of the sister; for the contingency which was immediately present to the testator's mind when he made the gift to the cousins was death and failure of issue of the sister.

*Mr. Sandys*, for the personal representative of the widow, contended that the gift over after the limitations to the sister and her issue was void for remoteness, as to the personal estate. If not, the shares of the cousins vested at the death of the testator, and the limitations over in favour of their issue having failed, the shares of those who died without issue in the widow's lifetime were undisposed of. At all events, the widow was entitled to a share as first cousin, though she was tenant for life.

*Mr. Wickens*, for the Attorney-General.

*Mr. Rolt*, in reply.

(a) 5 Ves. 186.

(b) 8 Hare, 301; and see *Philps v. Evans*, 4 De G. & Sm. 188.

(c) 2 Hare, 268. (d) 1 Price, 264. (e) 3 Hare, 86.

\* 654 \*THE LORD JUSTICE KNIGHT BRUCE. — The testator in this case, neither at the time of making his will nor at any time afterwards, had any issue. His sister survived him, but died without having ever married; and she was survived by the testator's widow, who recently died. Applying my observations to that state of things, and looking at every word of this will from beginning to end, — that is, not only at the passages immediately relating to the gift with which we are now dealing, but at those also which immediately relate to the postponed legacies, — I think, whatever be the construction of the gift to the testator's first cousins in other respects, it was not void for remoteness, either as to the real or personal estate of the testator, but fell within the rules of law.

The next question is as to the meaning of the gift "to my first cousins by my mother's side, and the issue of such of them as may happen to be dead, *per stirpes*, and to their heirs, executors, administrators, and assigns for ever, as tenants in common." There may be room for doubt, or at least for reasonable argument, as to what the testator meant by those words; but there is not sufficient strength in the expressions to warrant the Court, in my opinion, in departing from that which is presumptively the meaning; namely, that it comprehends all persons who answer the description of first cousins on the mother's side, either at the death of the testator or afterwards, before the period of distribution, which period here has happened to be the death of the widow. I think that, as in *Walker v. Shore*, (a) and various other cases before and after, the effect of those words, "my first cousins by my mother's side," if standing alone, would be to give title to all the first cousins on the mother's side to participate, whether consisting

\* 655 \*only of those living at the death of the testator, or consisting of those and any who might be added to them by subsequent births before the period of distribution, which subsequent births did not happen in the present case. There is not sufficient to limit them to such cousins only as should be living at the period of distribution.

Then comes the question, of some difficulty, as to the meaning of the words, "and the issue of such of them as shall happen to be dead;" words which, in my view of the will, can only apply

(a) 15 Ves. 122.

to one-fourteenth share, there having been only one of the fourteen cousins who died before the death of the widow leaving issue. I understand the record to be so, that this question cannot be decided at the present stage of the proceedings. The decree will therefore keep it open.

I need hardly add that, whatever in some instruments may be the meaning to be ascribed to the term "first cousin," in this particular will the testator himself has shown that he intends by that term only the children of uncles and aunts simply and strictly.

THE LORD JUSTICE TURNER. — I concur in the view which has just been stated. I think the testator clearly intended that, in the event of the death of his sister leaving no issue, the *corpus* of the property in which she was to have a life interest was to go to his first cousins. I collect that intention from his having given legacies to certain of his first cousins, on condition only that he and his sister should both die without leaving issue. I think that, on the reasonable construction of the will, the gift of the residue is subject to the same condition as these legacies are. An argument was attempted to be derived from the gift of legacies to several \* of the first cousins, as importing that they were \* 656 not intended to take the residue. The persons, however, to whom these legacies are given are only some of the first cousins; and the gift of legacies does not show that those living at the testator's death are not to take the residuary estate.

It was also argued, that the rule which applies to bequests to children, and by which after-born children are let in, does not apply to a bequest to first cousins. The argument was not supported by authority; and I do not see by what we are to be guided, if, in the case of a gift to a class of relations, that which is held a wise rule with regard to one grade of relationship is not to be so held with regard to another.<sup>1</sup>

Another argument was attempted to be founded on the words of futurity occurring in the bequest; and it was said that those words import futurity in the gift. No doubt words may be used which indicate an intention to refer to a class which shall exist only when distribution is to take place; but I think that, according to

<sup>1</sup> 2 Jarman Wills (3d Eng. ed.), 146.

the modern authorities, strong words are necessary for that purpose. The principle, as thus stated in *Seifferth v. Badham*, (a) is: "At the time the will is made, it is necessarily uncertain who will be the testator's next of kin at the time of his death. If, at the date of his will, he has children who are then his next of kin, they may die before him, and give place to his brothers and sisters. If, at the date of his will, he has brothers and sisters, he may afterwards have children born, who, at the time of his death, may displace the brothers and sisters. Contingencies of this sort are infinite, and, in general, it is perhaps probable that the testator, in such cases, means only to provide for those whom he does mean to benefit in the way he thinks best, and then to add that, \* 657 if events \* defeat that particular intention, the law may take its course. It is indeed quite unnecessary to express that, because the law will make its distribution without any direction; but it seems to me more probable, and more in conformity with the ordinary habits of men, that he should use that expression, though unnecessary, than that he should have meant a benefit to the particular persons who might chance to be his next of kin."

According to this reasoning, which is also adopted in *Jenkins v. Gower*, (b) and in all the subsequent cases of a gift to next of kin, the leaning of the Court always is to apply it to the objects living at the time of the death of the testator, subject to open so as to let in objects subsequently born before the period of distribution. I think that the same rule should be observed in the case of a gift to first cousins. It does not appear to me necessary, however, to decide this question now; for I think that no words of futurity are here annexed to the gift to first cousins. The gift is, "to my first cousins by my mother's side." Stopping there, the gift is a simple gift to first cousins, which would carry the property to all the cousins living at the testator's death, subject to letting in those afterwards born before the period of distribution. Then come the words, "and the issue of such of them as may happen to be dead;" but those words only refer to, and do not as it seems to me modify or alter, the class entitled under the previous words.

It was then submitted to their Lordships, that as the plaintiffs had purchased the interests of Mrs. Spilsbury's issue, but not the in-

(a) 9 Beav. 370.

(b) 2 Coll. 537.

terests of her personal representatives, the funds could not be disposed of, unless it was decided whether her share was given over by the will to her issue.

\* THE LORD JUSTICE KNIGHT BRUCE.—As it becomes \* 658 necessary to decide the point, our opinion is that, in the events which have happened, the share of Mrs. Spilsbury belongs not to her personal representatives, but to her issue.

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INGE v. THE BIRMINGHAM, WOLVERHAMPTON, AND  
STOUR VALLEY RAILWAY COMPANY.

1853. November 5, 10, 11. Before the Lord Chancellor Lord CRANWORTH.

Specific performance of a contract by a railway company to purchase an interest in land enforced at the suit of the vendor as falling within the provisions of the Statute of Frauds, in a case where the contract arose out of a notice to treat given by the company, and where the proof of the writing was found in documents which had their origin in an intention to carry out the purchase under the provisions of the company's special Act and the Lands Clauses Consolidation Act, 1845.<sup>1</sup>

To what extent the Court will interfere to compel the specific performance of contracts for the purchase of land made exclusively under Acts of Parliament containing special provisions for that purpose, *quære*.

A railway company is not entitled to take possession of land under the provisions of the Lands Clauses Consolidation Act, 1845, until it has settled, not only with the persons in possession of the land, but also with all persons having any interest, *semble*.<sup>2</sup>

THIS was an appeal by the defendants from a decision of Vice-Chancellor STUART, on the 25th April, 1853, decreeing specific performance of the contract to enforce which the bill was filed. The following statement, coupled with what appears in the Lord Chancellor's judgment, will sufficiently explain the facts of the case.

The plaintiff, Captain W. Inge, was seised in fee-simple, subject

<sup>1</sup> See 1 Sugden V. & P. (7th Am. ed.) [112] *et seq.* [115] n. (3), and cases cited; Old Colony Railroad Corp. v. Evans, 6 Gray, 25.

<sup>2</sup> 2 Kent (11th ed.), 339 and notes; Angell Watercourses (6th ed.), § 477, and cases in notes.



to an unexpired term of twenty-three years from Lady-day, 1848, of land at Birmingham, containing 3552 square yards, with the buildings thereon. In September, 1848, and after some preliminary communication with the plaintiff's solicitors, the company, in pursuance of the provisions of their special Act and of

\* 659 \* the Lands Clauses Consolidation Act, 1845, served the plaintiff with a notice to treat, stating that they required to purchase and take certain portions of this land, containing 330 square yards or thereabouts, together with the buildings thereon, specifying the portions required by a reference to numbers which designated pieces of ground of which what the company required formed part and a plan attached to the notice which show distinctly the particular portions required. The plaintiff's solicitors immediately served the company with a notice, dated the 6th September, 1848, by which the plaintiff claimed to be seised in fee-simple of the pieces of ground referred to in the plan numbered as mentioned in the company's notice to treat together with the buildings thereon, subject to an unexpired term therein, and which term and the rent payable in respect thereof were set forth in a schedule annexed to the notice. This schedule referring to the numbers gave the following particulars, — "Present lessee, Thomas Phillips. Rent reserved under lease, 32*l.* 13*s.* Unexpired term at Lady-day, 1848, twenty-three years:" and the plaintiff, by the notice, claimed 1500*l.* for the purchase of his interest in the said pieces of land, and for compensation for damage; namely, 1350*l.* for the purchase and 150*l.* for compensation. In December, 1848, the company took possession of the land, and not having come to any agreement as to the price, the plaintiff served them with notice to summon a jury to assess the amount of compensation. Early in January, 1849, communications took place between the company's surveyor and the plaintiff's solicitors, relative to the quantity of land included in the lease, and also (as the plaintiff alleged, but this was denied by the defendants) as to the amount of rent reserved. The defendants not having summoned the jury in pursuance of the notice so to do, the plaintiff, on the 16th January, 1849, commenced an action against them for the

\* 660 1500*l.* \* On the 3d February, 1849, the company's solicitor wrote to the plaintiff's solicitors as follows: "In this case the company will pay the 1500*l.* claimed for the purchase of Captain Inge's interest." An abstract of the plaintiff's title was

soon afterwards sent to the company's solicitor; and communications thereupon took place between him and the solicitors of the plaintiff. It having been arranged that a memorandum of the agreement to purchase should be indorsed on the plaintiff's notice of claim, the plaintiff's solicitors sent the notice with an indorsement to the company's solicitor to have the seal of the company affixed to it, accompanied by a letter, dated the 7th March, 1849, in which, referring to the ground-rent as being 32*l.* 13*s.* per annum, they stated that it must be apportioned, and that the amount on the 330 square yards taken by the company was 3*l.* 0*s.* 8*d.* to which the company would be entitled. Upon receiving this communication, the solicitor of the company wrote a letter in answer, stating that the company were entitled to the whole ground-rent specified in the schedule to the plaintiff's claim, and that they could not consent to any diminution. In July, 1849, the plaintiff proceeded with his action, and filed a declaration. The defendants demurred, on the ground that the plaintiff had not in the notice to summon a jury stated the particulars required by the provisions of the Lands Clauses Consolidation Act, 1845. On the 30th April, 1850, the plaintiff, who had previously discontinued his action, instituted the present suit, charging by his bill that the defendants' notice to treat and the service thereof on the plaintiff, constituted a contract of purchase and sale between the defendants and the plaintiff at a price to be afterwards determined either by agreement or according to the provisions of the Lands Clauses Consolidation Act; and that the price was afterwards agreed upon as above stated. The \* bill prayed, that the defendants might \* 661 be decreed specifically to perform the agreement, and to pay to the plaintiff 1850*l.* for the purchase of the lands and premises comprised in the notice to treat, and 150*l.* for compensation, with interest on both sums from the 8d February, 1849. The defendants by their answer refused to purchase the premises with a right only to an apportioned part of the ground-rent, alleging they had never agreed or intended to agree to do so; that on the 3d February, 1849, they did not know that the lands in question formed part of a larger portion of land comprised in one lease, or that the rent reserved by that lease was only 32*l.* 13*s.* per annum; and that, if the plaintiff did not intend to sell the whole ground-rent, they were misled by his notice of claim.

The case came on before Vice-Chancellor STUART in April, 1853,

when his Honor made a decree in favour of the plaintiff, as prayed by the bill. The company now appealed from that decision.

*Mr. Malins* and *Mr. Spooner*, for the plaintiff, supported the decree of the Vice-Chancellor. — They relied on *Hawkes v. The Eastern Counties Railway Company*, (a) and referred to the hundred and nineteenth section of the Lands Clauses Consolidation Act, 1845, and to *Burnell v. Brown*. (b)

*The Solicitor-General, Mr. Bacon*, and *Mr. Speed*, for the appellants, the railway company. — The plaintiff shows no ground for coming to equity: the whole question is a mere money payment, and a complete remedy is given by the sixty-eighth section \* 662 of the \* Lands Clauses Consolidation Act, 1845: there was besides no reason for the plaintiff not proceeding with the action at law which he had brought. The Court ought not, under the circumstances, to interfere to decree specific performance, but ought to leave the plaintiff to his legal remedies. We submit there was no contract within the Statute of Frauds; but even if there was, we say it is too uncertain for a Court of Equity to enforce. The whole transaction proceeded on a misunderstanding, the company supposing that they were purchasing a property leased at the entire rent, and the plaintiff referring their offer to the apportioned rent. Under this impression the business proceeded down to a certain point, when the parties discovered their mistake. It can never be maintained that what took place before the misunderstanding was discovered, even though it might under other circumstances constitute a final arrangement, can be so treated when the real position of the parties is taken into account; the communications, which led to the previous mistake being discovered, were for the purpose of making the agreement final. One reason against the Court interfering is, that it will involve a double jurisdiction, because, if the contract is established, the apportionment of the rent must still take place under the provisions of the Lands Clauses Consolidation Act, 1845.

They cited *Harnett v. Yeilding*, (c) *The Marquis Townshend v. Stangroom*, (d) *Flint v. Brandon*, (e) *Higginson v. Clowes*, (g)

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| (a) 1 De G., M. & G. 787. | (c) 2 Sch. & Lef. 549. | (e) 8 Ves. 159.  |
| (b) 1 J. & W. 168.        | (d) 6 Ves. 328.        | (g) 15 Ves. 516. |

*Helsham v. Langley, (a) Malins v. Freeman, (b) Manser v. Back, (c) Adams v. The London and Blackwall Railway Company, (d) Webb v. The Direct London and Portsmouth Railway Company. (e)*

\**Mr. Malins*, in reply. — After taking possession of the \* 663 land, the company cannot set up a defence on the ground of uncertainty, *Ogilvie v. Foljambe, (g)* especially having regard to the eighty-fourth section of the Lands Clauses Consolidation Act, 1845. Notice to treat has been held to create the relation of vendor and purchaser: *Stone v. The Commercial Railway Company; (h)* and when followed by the ascertaining of the price it amounts to, a valid and binding contract. *The Marquis of Salisbury v. The Great Northern Railway Company. (i)* The case of *Adams v. The London and Blackwall Railway Company (d)* is entirely distinguishable from the present.

THE LORD CHANCELLOR. — In this case I am clearly of opinion that the judgment of the Vice-Chancellor is right, subject only to providing that the inquiry as to title shall be, whether a good title can be made subject to the lease, and not, as it now stands, whether a good title can be made simply.

More than once in the course of the argument I expressed my opinion that questions were raised which were inapplicable to the case actually before me; I allude to questions with regard to how far this Court will or will not interfere to compel parties, who have entered into incipient contracts (so to call them) for the purchase of land under the provisions of Acts of Parliament similar to that now before me, to complete those contracts. This case has, I conceive, no reference to questions of that sort; for what the plaintiff says is \* that he is entitled to a spe- \* 664 cific performance of a written agreement entered into by the defendants for the purchase from him of his interest in certain pieces of land at a certain price; and if that be so, it is immaterial whether the circumstances which led to the defendants' entering into such a contract arose out of the Act of Parliament, or were

(a) 1 Y. & C. C. C. 175.

(b) 2 Keen, 25.

(c) 6 Hare, 443.

(d) 2 M. & G. 118.

(e) 1 De G., M. & G. 521.

(g) 3 Mer. 53.

(h) 4 M. & C. 122.

(i) 21 Law J., Q. B. 185.

collateral to and independent of it. If, from any cause whatever, the defendants have bound themselves by a contract falling within the provisions of the Statute of Frauds to purchase an interest now vested in the plaintiff at a given ascertained sum, they must complete it; and the circumstance that the writing is to be found in part in some documents which were originally intended to be ancillary to another mode of enforcing the contract, namely, under the provisions of an Act of Parliament, seems to me to be wholly unimportant.

The contract which is here sought to be enforced is a written contract, signed by the solicitor of the company under circumstances in which it is admitted that the solicitor bound them; it is to be found in the letter of the 3d February, 1849.

[His Lordship here read the letter.]

I confess I had at first some doubt whether the subject-matter of the contract was here so ascertained as to enable the Court to decree a specific performance; but further consideration has entirely removed all doubt from my mind on that subject. The company were authorized to purchase whatever land might be necessary for the purpose of their railway within certain limits which included the premises in question, and they were not entitled to purchase any thing else. They then, wanting the larger portion of the premises designated by the numbers mentioned in the notice to treat, after some communication with the plain-

\* 665 tiff's solicitors on the subject, send that notice, as \* required by the Act of Parliament, pointing out distinctly what it was that they wanted, and calling upon the plaintiff to state what the nature of his claim was. The nature of the plaintiff's claim was this, — he was seised in fee of a large tract of land in that part of Birmingham, subject to a lease for ninety-nine years, which had been granted in 1772, and of which, at the time when this negotiation took place, there were twenty-three years unexpired; and the whole had been then granted on building leases at a rent of 32*l.* 13*s.*

The plaintiff, having been informed by the notice what the company wanted, sends in, as required by the Act of Parliament, a statement of his claim.

[His Lordship here read the claim to the effect above mentioned.]

There may possibly be some little ambiguity of expression in the wording of the document, but the parties could have no doubt as to its meaning, and there is no absolute inaccuracy. Coupling the notice with the schedule, it was a distinct statement, on the part of the plaintiff, to the company, that he claimed an absolute fee-simple in that part of certain portions of land specifically mentioned in the notice to treat, which had been pointed out as required by the company; and it was distinct notice also that his fee-simple interest was a fee-simple interest subject to a lease existing in a gentleman of the name of Phillips, of which twenty-three years were unexpired: it was also, I conceive, positive notice that that 32*l.* 13*s.* was a rent reserved for more property than that which was claimed by the railway company. It may not have been clear how much was included in the lease; but that something more was included than the property which the railway company were wanting to take was an absolute certainty. The interest claimed by the plaintiff was a reversionary interest the purchase of which would not therefore enable \* the \* 666 company to get possession of the land; they would want to get the interest for the unexpired term of twenty-three years, and for that purpose would have to negotiate with the tenants. It appears that they took this course; and that, while negotiating with the plaintiff, they also negotiated with the parties in possession of the land, and got from them abstracts of their titles, which abstracts showed that these titles were carved out of a lease held for a term of ninety-nine years commencing in 1772, and which would therefore expire at Lady-day, 1871, or, adopting the language of the plaintiff's claim, at the end of twenty-three years from Lady-day, 1848, at a rent of 32*l.* 13*s.* It is impossible to pretend that there is any doubt that the company must have known that that was the same interest, although the lease granted in 1772 was not granted to a tenant of the name of Phillips, the party named in the plaintiff's claim: the circumstance that after the lapse of seventy-five years the owner of the lease should not be a person of the same name to whom it was originally granted, would excite no doubt whatever, where the land was the same, granted at the same rent, and the lease to expire at the same time.

The company had therefore distinct notice that the plaintiff's interest was an interest subject to a ninety-nine years' lease which commenced in 1772 ; that is, a lease which would expire in twenty-three years or thereabouts from the time of entering into the contract.

The company, having settled with the tenants, took possession of the land. This, I conceive (though it is a course I believe often pursued), was contrary to the provisions of the Act ; for they had no business to take possession until they had settled with everybody. The plaintiff, then, finding that they were not  
\* 667 proceeding to \* settle with him, gave a notice to summon a jury to fix the value of his land. Upon that notice nothing was done ; and after the time mentioned in the notice had expired an action was brought. The next step was, putting all parol evidence entirely out of the question, that, on the 3d February, 1849, the company, through their agent, Mr. Carter, wrote to the plaintiff or his solicitors the letter to which I have already alluded. It appears to me that that letter was a distinct contract in writing that they would purchase for 1500*l.* the plaintiff's reversionary interest in the pieces of land in question ; and, recollecting that at this time the company had settled with the tenants, it was wholly immaterial to them what the rent was. It was not a rent-charge they were purchasing ; all they wanted was possession of the land, and to obtain this they had to get in the interest of lessor and lessee. It is thus perfectly clear that what they became bound to do was to pay the 1500*l.*, and to get a conveyance from the plaintiff of the reversion of the land. Under these circumstances the abstract of title is delivered, and it is proposed, very reasonably, by the plaintiff, in order to save the necessity of going before a jury or a justice, that the rent shall be apportioned. In answer to this, the company make a claim to the whole of the rent. In no view of the case, however, can they possibly be entitled to any rent. These companies can only purchase that which the Railway Acts authorize them to purchase ; namely, that which is necessary for the construction of the railway : the defendants, therefore, could never have imagined that they were entering into a contract for the purchase of a ground-rent, which is only a matter of speculation. It thus appears to me, even independently of the distinct notice that there was of what it was in respect of which the whole rent of 32*l.* 13*s.* was payable, that all that

the company are \* entitled to is the plaintiff's reversionary \* 668 interest in the land, the possession of which they acquired under the tenants. This is what the decree appealed from has given them, with the proviso of the plaintiff being able to make a good title. This proviso ought to be, if he can make a good title subject to the lease: it may not, however, be necessary to add that, if it is perfectly understood by the parties that no objection is to be taken to the plaintiff's title on the ground of his not being able to give possession.

Appeal dismissed with costs.

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COOKSON v. BINGHAM.<sup>1</sup>

1853. November 16. Before the Lord Chancellor Lord CRANWORTH and the LORDS JUSTICES.

A testator, by his will, gave "my landed estates in W., of whatever description, with their appurtenances, and all allotments of common, now inclosed or hereafter to be granted to my daughters J. M. and S., to be jointly and equally enjoyed or divided in the case of the marriage of any of them; and they or the survivor, in case of death, are by this my will fully authorized to dispose of the same by will or assignment, as they shall think proper, giving preference to those of my name and relations, according to behaviour;" and he gave them also all his personal property, "to be by them equally divided and shared among them," and he recommended them to live together. The three daughters died unmarried. M. and J. survived S. and executed wills respectively devising all their real estate to each other for life, but with different remainders over. J. survived M. After the death of J., the plaintiff claimed a moiety of the real estates under the will of M. The defendant claimed the entirety under the will of J. *Held*, that, though the power of disposition by deed might have been exercised by J., M., and S., or by J. and M., in their lifetime, yet that J., as the survivor, had alone the power of disposing of the estates by will, and that the defendant, as her devisee, was entitled to the entirety.

*Semble*, that the will of the testator created a joint tenancy in fee.

WILLIAM BOWNAS by his will, bearing date the 2d August, 1821, gave and devised "my landed estates in the county of Westmore-

<sup>1</sup> S. C., 17 Beav. 262.



land, of whatever description, with their appurtenances, and all allotments of common, now inclosed, or hereafter to be granted and inclosed, to my dear daughters Jane, Mary Ann, and \* 669 Sarah, to be jointly and equally enjoyed or \* divided in the case of the marriage of any of them; and they or the survivor, in case of death, are by this my will fully authorized to dispose of the same by will or assignment, as they shall think proper, giving preference to those of my name and relations according to behaviour. I also give and bequeath to my three daughters, above mentioned, all my personal estate in money, funds, debts, or otherwise, to be by them equally divided and shared among them, first subject to the legacies and expenses mentioned in this my last will; also all plate, jewels, and furniture, in all my houses at the time of my decease, to be shared like my personal estate (except such as are particularly given in my list of legacies on the other side of this sheet); also to my said three daughters all my books, pictures, and prints, music, and musical instruments. Also the house in Allsop's Buildings, the lease of which I purchased lately of Colonel O'Hara; also the mortgage on the Diamond Estate, in the Island of Grenada, for 4000*l.* granted by Colonel Harwood. And I also by this my last will and testament appoint my three daughters above mentioned, Jane, Mary Ann, and Sarah, my executors to this my will, and also residuary legatees, to give mourning according to their discretion, all of them being of mature age to act; and I scarcely need to recommend them to remain together as long as they can, and to love and respect each other according to the principles in which they have been inculcated,\* keeping in mind if I had been less liberal in their education, I should have left more property behind me."

W. Bownas died in January, 1823, leaving his three daughters, his coheirresses, him surviving. Upon his death his three daughters proved his will and entered into possession of his freehold, copyhold, and leasehold estates, and continued in such possession until the death \* of Sarah, during which period the rents of the estates were by their direction paid to their joint account, with Messrs. Drummond, their bankers.

In 1828 Sarah died, and by an unattested instrument without

\* *Sic.*

date, she purported to devise and bequeath to her sisters Jane and Mary Ann her share of all the real and personal estates devised and bequeathed by W. Bownas. The surviving sisters, Jane and Mary Ann, proved her will, and took possession of the whole of the freehold, copyhold, and leasehold estates, devised by the will of W. Bownas, and continued in such possession up to the death of Mary Ann, during which period the rents were paid into their joint account with Messrs. Drummond.

On the 17th March, 1851, Mary Ann Bownas and Jane Bownas each executed a will, whereby, after directing the payment of certain legacies, they respectively devised and bequeathed the whole of their real and personal estate upon trust for each other for their respective lives. By the will of Mary Ann the plaintiffs were to take her real and personal estate in remainder after the death of Jane; and by the will of Jane the defendant, P. Bingham, took a vested interest in her real and personal estate in remainder after the death of Mary Ann Bownas.

Mary Ann Bownas died in November, 1851, without ever having been married, leaving Jane Bownas her heiress-at-law. On her death Jane Bownas entered into possession of the whole of the freehold, copyhold, and leasehold estates which were devised and bequeathed by W. Bownas, and continued in such enjoyment until her death, in June, 1852, whereupon the defendant, P. Bingham, as her devisee, entered into possession of \* the whole \* 671 of such freehold, copyhold, and leasehold estates.

The plaintiffs, by their bill, submitted that, according to the true construction of the will of W. Bownas, his three daughters, Jane, Mary Ann, and Sarah, became entitled to his freehold, copyhold, and leasehold estates, as joint tenants for life, with a power of partition in case of marriage, and with a general power of appointment; and that, in the events which had happened, one moiety of the said estates was well devised by the will of Mary Ann Bownas.

When the cause came on to be heard before the Master of the Rolls, his Honor was of opinion that, according to the true construction of the will of W. Bownas, his three daughters, Jane, Mary Ann, and Sarah, took the estates thereby devised as joint tenants in fee, and that the same, having survived to Jane, passed under her will to the defendant, P. Bingham.

The plaintiffs now appealed to the Lord Chancellor.

*Mr. R. Palmer, Mr. John Rudall, and Mr. Hetherington*, in support of the appeal. — It is quite clear that, with respect to the personal estate, the daughters took as tenants in common; and if it was doubtful whether they took the real estates as joint tenants or as tenants in common, the presumption is, that the testator intended his daughters to take similar interests in his realty and personalty. The power being to be exercised by the daughters, and they or the survivor being authorized to dispose of the estates by will or assignment, it follows that they took as tenants in common, and that the word “they” must be read distributively, and \* 672 as giving a power to each; the words “or the survivor” would be quite irreconcilable with any other hypothesis; the words “in case of death,” must be referred to the death of the testator: *Doe v. Prigg*; (a) otherwise these latter words must be rejected as senseless. The words “or divided” are important also to show that a tenancy in common was contemplated by the testator; and the words “as they shall think proper” do not create a trust: *Meredith v. Heneage*; (b) but if they do, the inference is that the donees of the power only took life-estates; and this presumption is also strengthened by the fact that the testator has, after the gift of his landed estates, given the allotments of common, which, if he had given the fee-simple, would have been included. For the purpose of our argument, however, it is immaterial whether they took for life or in fee. We submit that, in cases where it is doubtful whether donees are to take as joint tenants, or as tenants in common, this Court always favours that construction which confers a tenancy in common rather than a joint tenancy, and particularly where the ambiguity arises under a testamentary instrument; but where, as in this case, the will contains expressions importing division or even words simply denoting equality, the uniform current of the later authorities is in favour of construing the devise or bequest as a tenancy in common: thus, where the devise was to several persons “equally,” *Lewin v. Dodd*, (c) or “equally amongst them,” *Warner v. Hone*, (d) or where profits of land were to be distributed “in joint and equal proportions,” *Ettricke v. Ettricke*, (e) or in case of a money legacy to two “jointly and equally between them,” *Perkins v.*

(a) 8 B. &amp; C. 231.

(b) 1 Sim. 542.

(c) Cro. Eliz. 443; *sub nomine*, *Lewin v. Cox*.

(d) Prec. in Chan. 491.

(e) Amb. 656.

*Baynton*, (a) or "equally to be \*divided between them," \*673  
*Haws v. Haws*; (b) in all such cases the construction has  
 been that a tenancy in common was indicated. In the present  
 case, the word "equally" coming last, affords an additional argu-  
 ment for a tenancy in common.(c)

The Lord Chancellor observed, that the present was a legal question, and that his decision would not prevent the parties bringing ejectment; that the case could only be heard by him on the parties consenting to be bound by the declaration of the Court.

[And on this understanding the argument was proceeded with.]

*The Solicitor-General, Mr. Roupell, and Mr. Grove*, in support of the decision of the Master of the Rolls. — The construction which has been put upon the devise as conferring a joint tenancy in fee, while it is more consistent with the testator's meaning, only involves the necessity of rejecting what is surplusage: *Expressio eorum quæ tacite insunt nihil operatur*; the addition, therefore, of "the allotments of common" cannot derogate from the previous gift of the fee-simple of the landed estates. Wherever the word "jointly" is used, it is impossible to hold that the testator means a tenancy in common; and the addition of the word "equally" does not detract from, and is not at variance with, such a construction. The word "they" cannot be read distributively without rejecting the words "or the survivor of them in case of death," as senseless; and the death there predicated is clearly not the death of the testator. Undoubtedly the most natural construction is, that the testator intended to confer a power \*which might be exercised by deed by all three collec- \*674  
 tively, and then by two; but that the survivor alone should have a power to dispose of the estates by will.

*Mr. R. Palmer*, in reply.

THE LORD CHANCELLOR. — I do not know of any more unsatisfactory duty for a Judge than that of being called upon to put a construction on an instrument with respect to which, it may be

(a) 1 B. C. C. 118. (b) 3 Atk. 524. (c) 1 Watk. Com. 151.

presumed, the framer of the instrument had himself no very definite notion. It is a duty, however, of necessity, imposed on the Judges of this Court, who, as Lord MANSFIELD has observed, must sometimes feel that they are the only authorized interpreters of nonsense.

From the best attention I can give to this case, it appears to me that the construction put upon it by the Master of the Rolls is in all probability the right one. When I say in all probability the right one, I am not at all clear whether the three daughters took joint interests in the fee, or for life, with a power of disposition only in the survivor; but I am satisfied that, putting marriage out of the question, the testator meant that no one of his three daughters, except the survivor, should have a power of disposition of the property by will. In the first place, he begins, "My landed estates in the county of Westmoreland, of whatever description." Now that, I think, *prima facie*, means the fee-simple of these estates. It occurred in the course of the discussion that a little doubt was thrown upon this construction by the following words, "with their appurtenances and all allotments of common," — as if the testator did not consider that as part of his landed estates. This \* 675 observation is, perhaps, a mere refinement \* upon the testator's language. Practically, in a will of this sort, no satisfactory argument can be derived from the fact that tautologous or superfluous words are used with a view of including that which the law would have included. I see nothing, however, in this will leading to the conclusion that the words "my landed estates" mean any thing less than the fee-simple of those estates.<sup>1</sup> How then are they to be enjoyed?

[His Lordship here read the devise.]

As to the clause directing his daughters to give "preference to those of my name," &c., it is plain that that clause is merely directory or precatory, and not meant to impose any positive trust. The estates being devised by the testator to his three daughters to be jointly and equally enjoyed, coupled with the recommendation to respect each other, and to live together, clearly shows that he meant those estates to be a common fund for the maintenance of the

<sup>1</sup> 2 Jarman Wills (3d Eng. ed.), 255; *White v. Coram*, 3 K. & J. 652; *Doe v. Fricker*, 6 Exch. 510.

three so long as they lived and continued unmarried. That being so, the question is, whether the testator contemplated that each of the three should have the power of disposing by will of an interest to take effect after the death of the survivor, or did he mean that the survivor only should have the power of disposing by will. In my opinion, the latter was what he contemplated, and in truth the expression "they or the survivor in case of death are by this my will fully authorized to dispose of the same," would be inapplicable to the case of a power to dispose of a reversionary interest expectant after the expiration of one or two previous life interests; nor can I think that the testator contemplated any thing so refined as that. The authority "to dispose of the same by will or assignment," &c., must, I think, be interpreted as the Solicitor-General suggests, that the testator meant by the word assignment to give an absolute power of disposition, to be exercised by deed by the three, \* or the two surviving, but that the power by will \* 676 was limited only to the survivor.

It was argued that a tenancy in common must have been intended, because, in the event of the marriage of one or more of his daughters, the testator has directed that the property should be "divided;" but whether he meant it was to be divided in the sense of its becoming an interest in common, as contradistinguished from a joint tenancy with the possibility of there being a partition *quoad* a share taken out on marriage, it is not necessary to speculate upon, because in point of fact there was no marriage.

Upon the whole I am inclined to think that the Master of the Rolls is right in saying that the three daughters took a joint interest in fee. If they did not take a joint interest in fee, then there was no power of disposition of the fee by will except in the survivor, so that substantially the declaration of the Master of the Rolls is correct: therefore I think the appeal must be dismissed, and if the house in Allsop's Terrace (a) be insufficient to pay the costs of the appeal, the appellants must make good the deficiency.

The Lords Justices concurred.

(a) It was arranged between the parties that the house in Allsop's Buildings should be sold for the purpose of defraying the costs of the suit.

1853. December 20, 21, & 22. January 11, 1854. Before the Lord Chancellor Lord CRANWORTH.

Where a defendant admits an agreement, if he means to rely on the fact of its not being in writing and signed, and so being invalid by reason of the Statute of Frauds, he must say so; otherwise he must be taken to mean that the admitted agreement was a written agreement good under the statute, or else that, on some other ground, it is binding on him.<sup>2</sup> But where he denies or does not admit an agreement, he need not plead the Statute of Frauds; the burden of proof is altogether on the plaintiff, who must then produce a valid agreement capable of being enforced.

Specific performance of an agreement to lease refused, when the alleged contract was founded upon expressions, in a letter written by the defendant's agent to the intended lessee, to the effect that instructions had been given for the preparation of the lease in conformity with terms arranged, no agreement having been actually signed.<sup>3</sup>

The owner of an estate, in answer to an inquiry from an intending lessee, said, "A. B. manages all my affairs, and you are to treat with him." This does not imply that A. B. had authority to enter into a binding agreement, *semble*.

THIS was an appeal by the defendant, Henry Lawes Wharton, from a decree of the Vice-Chancellor STUART, made on the 19th July, 1853, declaring that the plaintiff, Mark William Ridgway, was entitled to the specific performance of an agreement to grant a lease of a public-house called the Greyhound at Sydenham. The case made by the bill, which was filed on the 5th December, 1852, was that the plaintiff being in 1849 the occupying tenant of the public-house under Messrs. Meux & Co., which lease expired

<sup>1</sup> S. C., 24 L. J. Ch. 46; 4 Jur. N. S. 173; affirmed, 6 H. L. Cas. 238.

<sup>2</sup> See 1 Dan. Ch. Pr. (4th Am. ed.) 656 and note; *Skinner v. M'Douall*, 2 De G. & Sm. 265; 12 Jur. 741; *Baskett v. Cafe*, 4 De G. & Sm. 388; *Jackson v. Oglander*, 2 H. & M. 465; *Woods v. Dike*, 11 Ohio, 455; 2 Story Eq. Jur. §§ 755-758; *Flagg v. Mann*, 2 Sumner, 528, 529; *Newton v. Swasey*, 8 N. H. 9; *Thompson v. Todd*, 1 Peters C. C. 388; *Dean v. Dean*, 1 Stockt. (N. J.) 425; *Ashmore v. Evans*, 3 Stockt. (N. J.) 151; *Van Duyne v. Vreeland*, 1 Beasley (N. J.), 142; S. C. 3 Stockt. (N. J.) 370; *Thornton v. Henry*, 2 Scam. 219; *Ontario Bank v. Root*, 3 Paige, 478; *Cozine v. Graham*, 2 Paige, 177; *Whitchurch v. Bemis*, 2 Bro. C. C. (Perkins's ed.) 566, 567 n. (c); Story Eq. Pl. § 763.

<sup>3</sup> See the remarks of Lord ST. LEONARDS upon this point in the House of Lords, S. C., 6 H. L. Cas. 238, 287 *et seq.*

in June, 1852, was desirous of obtaining from the defendant, who was the owner of the fee, a lease to take effect from the time of the expiration of Messrs. Meux's lease, and that having applied to the defendant for that purpose, was informed by him that Mr. Crawter managed his business, and he would send him to look over the premises, and whatever Mr. Crawter arranged he should be satisfied with. The bill stated that the defendant had instructed Mr. Crawter as to the letting of the premises, and, in June, 1849, wrote to the plaintiff the following letter: "Mr. Wharton has this day seen the surveyor, Mr. Crawter, and sends Mr. Ridgway this note to inform \* him that Mr. Crawter has prom- \* 678 ised to go over to Sydenham on Saturday next, at about twelve o'clock, for the purpose of looking at the Greyhound, and receiving any communications which Mr. Ridgway may be disposed to make to him." The bill then stated that Mr. Crawter inspected and reported to the defendant on the state of the premises, and was afterwards requested by the defendant to arrange with the plaintiff the terms of the lease, and that in pursuance of a request made by Mr. Crawter, the plaintiff went to Carshalton on the 26th June, 1849, when Mr. Crawter agreed on behalf of the defendant to grant the plaintiff a lease of the premises for twenty-one years, on the terms of the plaintiff laying out 600*l.* on the property. The bill alleged that this agreement was identical with certain terms recommended by Mr. Crawter to the defendant in his report on the 7th June, 1849, except that that report excluded a small triangular piece of ground which the plaintiff prevailed upon Mr. Crawter to include.

The bill stated that the plaintiff, not having signed any writing, accepting the terms, Mr. Crawter wrote and sent to the plaintiff the following letter: "No. 7, Southampton Buildings, Chancery Lane, July 2, 1849. Sir,—Please to recollect you have not written to me with respect to the terms for the agreement as arranged when we met on Tuesday last at Carshalton. I cannot do any thing till you write. Yours obediently, HENRY CRAWTER, Jun.—Mr. Ridgway." The bill stated that in answer to such last-mentioned letter, the plaintiff wrote and sent to Mr. Crawter the following letter: "Sydenham, July 3, 1849. Sir,—I beg to apologize for not writing to you before this, but it has been a subject of great consideration on my part, the shortness of the lease, the proposed outlay, and having worked very hard for the



\* 679 last fourteen years with so little profit or advantage, \*I certainly should feel very much obliged to you if you would allow me a longer term of lease; if not, I must submit to your terms, and will thank you to draw up the agreement at once as you proposed. Yours obediently, MARK W. RIDGWAY."

The bill then stated that Mr. Crawter did, with the approbation of the defendant, in July, 1849, give to Mr. Gregson, the solicitor of the defendant, instructions in writing, setting forth the terms of the lease as above agreed to, with a view to a more formal agreement being prepared; that on the 27th August, 1849, the plaintiff not having received any agreement or draft, wrote and sent to Mr. Crawter the following letter: "I have been expecting to receive from you the copy of the agreement. Will you be kind enough to send it to me at your earliest convenience?" that, in reply to which last-mentioned letter, Mr. Crawter wrote and sent to the plaintiff the following letter: "No. 7, Southampton Buildings, Chancery Lane, September 20, 1849. Sir,— Mr. Wharton's solicitor had instructions from me long since to prepare the agreement, and I fully expected he had done so; but my absence from town has prevented my seeing him, but will do so in a day or two. Mr. Taylor has been trying to learn from Mr. Wharton the terms arranged with you, but which neither he or Messrs. Meux can have any thing to do with, and he seems to intimate that Messrs. Meux should have had the refusal of the premises, but I can remind Mr. Taylor that they had the offer of them, and he on their behalf declined. It strikes me the less communication you have with Mr. T. the better. Yours obediently, HENRY CRAWTER, Jun.— Mr. Ridgway."

No agreement having been prepared, the bill alleged that the plaintiff called five or six times upon Mr. Crawter between \* 680 September, 1849, and April, 1852, for the purpose \* of obtaining the agreement, on which occasions he repeatedly assured the plaintiff that he need be under no apprehension about the lease.

The bill then stated that on 26th April, 1852, the plaintiff wrote to Mr. Crawter: "Sir,— I have the honour to apply to you for the agreement regarding this house, which you were good enough to say should be forwarded to me. I trust you will not think me troublesome, but I am anxious on the subject, as the time is drawing nigh. I remain your obedient servant, M. W. RIDGWAY."

That Mr. Crawter, in answer to the last-mentioned letter, wrote and sent to the plaintiff the following letter: "No. 7, Southampton Buildings, Chancery Lane, April 30, 1852. Greyhound and premises. Sir,—I find it is as far back as 1849 that I reported to the Rev. Mr. Wharton, since which changes have taken place, and he has now requested me to view the premises, for the purpose of arranging the future letting, which I hope to do one day next week, and will then see you. I remain yours obediently, HENRY CRAWTER, Jun.—Mr. Ridgway."

The bill then stated that on the 12th May, 1852, Mr. Crawter went to inspect the premises, and informed the plaintiff that he might have a lease of the premises for twenty-one years, at 100*l.* a year, but that one of the fields must be exempted from the lease; and that on the 15th May, 1852, Mr. Crawter wrote to the plaintiff the following letter: "Sir,—I do not think I can add or alter what passed on Thursday between us, but as time draws nigh to the end of Messrs. Meux's lease, something must be decided forthwith, and unless you agree, we must advertise the place, having given you the tenant in possession the usual opportunity of rehir- ing the premises, and at a less rent than the market value for a licensed house, with the advantage of grounds, buildings, &c. Please not to defer deciding one way or the other at the \*beginning of next week. Yours, &c., HENRY CRAWTER, \*681 Jun.—Mr. Ridgway.—P.S. Do you know Farquhar's, No. — in Moorgate Street? I am told by judges the terms offered to you are moderate."

The bill then set forth a long letter written on the 18th May, 1852, by the plaintiff to Mr. Crawter, which concluded thus: "I venture to hope therefore, upon consideration of the above facts, you will be able to advise Mr. Wharton to grant me the lease upon the terms of the agreement made in 1849, but if it is preferred, I will adhere to the offer I verbally made when I last saw you, viz. to pay 80*l.* rent, but in that case I am not to expend more money in improvements, &c., than I think needful. If this offer is not accepted, it must not be considered to interfere with my right to have the agreement of 1849 carried out in case of our not being able to agree upon other terms. I am, sir, your obedient servant, M. W. RIDGWAY." In reply to the last-mentioned letter, Mr. Crawter, on 22d May, 1852, wrote to the plaintiff the following letter: "Sir,—In reply to your letter of the 18th inst., I beg

to inform you I have to-day seen the Rev. Mr. Wharton on it, and he desires me to say that he considers there is nothing decided as to the terms of letting you the premises from Midsummer next; and he concluded long since, not hearing any thing upon the subject, that the transaction in 1849 had all blown over and was at an end. Property at Sydenham has much improved since 1849, and other changes have taken place, amongst them the water supply, and the removal about to take place of the Crystal Palace, &c. I am now instructed to give publicity to the letting, in order that Mr. Wharton may obtain the fair market value of this property, which is all he requires, and all that has previously  
 \* 682 transpired \* goes for nothing. I remain yours obediently,  
 HENRY CRAWTER, Jun."

The bill alleged that the defendant had informed Mr. Taylor, the agent of Messrs. Meux, of the agreement with the plaintiff in September, 1849, and after stating that the defendant had brought an action of ejectment to recover possession of the premises, prayed an injunction to restrain such action and specific performance of the agreement entered into by or in the name of the defendant.

The defendant, by his answer, denied that Mr. Crawter was his agent to let the premises, but alleged that he was merely employed to survey the defendant's property at Sydenham, and to receive communications from the plaintiff. The defendant stated his belief that no note or memorandum in writing was ever made by Mr. Crawter of any lease to be granted by the defendant to the plaintiff, but did not in his answer set up the Statute of Frauds. With reference to Mr. Crawter's instructions to Mr. Gregson to prepare a lease, the defendant stated that the extent to which the instructions referred to in the letter of 20th September, 1849, went, was that Mr. Gregson should prepare a draft agreement for his, the defendant's, own private consideration.

The following is a copy of the instructions left by Mr. Crawter with Mr. Gregson: "Memorandum of terms for an agreement for a lease to be granted by the Rev. Mr. Wharton to Mr. Mark W. Ridgway." "Premises situate at Sydenham, in the parish of Lewisham, Kent. Nos. on plan on deed of partition. 20, Greyhound Inn, bowling-green, garden, stabling and meadow, 8a. 1r. 11p. No. 32, triangular piece of arable, formerly meadow, 3r. 12p.

An agreement for a twenty-one years' lease to commence at  
 \* 683 the expiration of Messrs. Meux & Co.'s \* term. Mr.

Ridgway to lay out not less than 600*l.* in taking down and rebuilding part of the Greyhound Inn; viz., two parlours and rooms over, and in sinking a well. The lease to contain covenants to uphold and keep the whole of the premises in substantial repair, and so deliver up the same. The rent 70*l.* clear. Tenant to insure and pay all taxes. N. B. Mr. Ridgway is about to arrange with Messrs. Meux & Co. for the remainder of their term; viz., three years at Midsummer, 1849; and therefore the outlay would be immediate on the agreement being entered into, the draft of which please to send to Messrs. Crawter, of Southampton Buildings." The defendant admitted the probability of his having told Taylor, in October, 1849, that he was not in a situation to entertain a proposal until the plaintiff's application was disposed of. He also admitted having written a letter to Mr. Crawter, in 1849, on the subject of letting the premises, which letter, he stated by his answer, "does not now exist; the same having been afterwards returned to me by Mr. Crawter for my examination, and Mr. Crawter never having asked me for it again, I destroyed it along with old letters relating to other matters, and I do not particularly remember the contents of such letter, but I am certain that the said letter contained nothing authorizing Mr. Crawter to make any such agreement or acknowledging that any such agreement had been made as the plaintiff alleges, or any other agreement with the plaintiff or any other person for a lease of the premises."

The plaintiff and defendant were both examined, as also Mr. Crawter and Mr. Taylor. Mr. Crawter stated he had no authority to grant a lease, but he admitted that in June, 1849, after having surveyed the premises and sent in his report, that the defendant told him, "You may see Mr. Ridgway on the recommendation in your \* report." Mr. Taylor verified the statement \* 684 in the bill to the effect that, being desirous on behalf of Messrs. Meux of obtaining, he applied for, a renewal of the lease, and in answer to that application, the defendant informed him that the house was irrevocably gone from Messrs. Meux, and that it had been let to the plaintiff. Under these circumstances, and upon this evidence, the Vice-Chancellor having decreed specific performance of the agreement as alleged in the bill, the defendant now appealed.

*Mr. Malins and Mr. W. D. Lewis*, for the plaintiff, in support

of the decree of the Vice-Chancellor. — The defendant relied in the Court below upon the Statute of Frauds, but, not having pleaded it in his answer, he is precluded from setting it up as a defence. The agreement, however, was clearly a binding and authorized contract, there being a determinate price and subject-matter. *Ogilvie v. Foljambe*, (a) *Fowle v. Freeman*, (b) *Owen v. Thomas*, (c) *Skinner v. M'Douall*. (d) The defendant is completely bound by the fact of his agent, Mr. Crawter, having given instructions to the defendant's solicitor to draw up the agreement; and the evidence of the agent, limiting the extent of his authority, must be received with the most anxious jealousy. *Howard v. Braithwaite*. (e)

*The Solicitor-General, Mr. Bacon, and Mr. Heming*, for the defendant, in support of the appeal. — The Vice-Chancellor's judgment is mainly founded on the letter of the 20th September, 1849, which he held to be a sufficient compliance with the Statute of Frauds; but that letter only referred to certain terms contained in another instrument, which the writer was permitted to explain and incorporate with the letter, a course of proceeding wholly without precedent. The Vice-Chancellor also admitted, as evidence for the plaintiff, certain instructions sent by the agent of the defendant to his own solicitor to prepare a lease; but, in the language of Sir W. GRANT, "This amounts to no more than a mandate from a principal to his agent, which can give no right or interest to a third person in the subject of the mandate. It may be revoked at any time before it is executed, or at least before any engagement is entered into with a third person to execute it for his benefit. And it will be revoked by any disposition of the property inconsistent with the execution of it." *Scott v. Porcher*, (g) *Foligno v. Martin*. (h) Assuming, however, for a moment that the document in question is admissible as evidence against the defendant, yet it is wholly immaterial in the present case when the defendant insists upon the benefit of the Statute of Frauds. *Blagden v. Bradbear*. (i) The case of

(a) 3 Mer. 53.

(b) 9 Ves. 351.

(c) 3 M. &amp; K. 353.

(d) 2 De G. &amp; S. 265.

(e) 1 V. &amp; B. 202.

(g) 3 Mer. 652; see p. 664.

(h) 22 Law J. Ch. 502.

(i) 12 Ves. 466.

*Boydell v. Drummond* (a) shows that even if there had been a concluded contract, though wanting in the requisites prescribed by the Statute of Frauds, that statute would have been an answer to the plaintiff's claim. In the present instance, the alleged contract being different from that sought to be enforced, there can be no specific performance. *Thynne v. Lord Glengall*, (b) *Woollam v. Hearne*. (c)

*Mr. Malins*, in reply. — At the conclusion of the argument the Lord Chancellor \* said the question seemed to him \* 686 to be not whether there was an agreement in writing within the statute or not, but whether there was any agreement at all.

1854. January 11.

THE LORD CHANCELLOR. — This case was heard before me on the last day before the Court rose. It is an appeal from a decree of the Vice-Chancellor STUART, in which the Vice-Chancellor has decreed specific performance of an agreement alleged to have been entered into by the defendant, to grant to the plaintiff a lease of a certain house called the Greyhound Public-house at Sydenham. The defence is, that there was no agreement. The agreement relied on by the plaintiff is an agreement said to have been made by a gentleman of the name of Crawter, a surveyor, as the agent of the defendant, and by his authority. The defendant says he never gave the authority; and that, if he had done so, Mr. Crawter never made any agreement in writing, and so he denies both propositions of the plaintiff, both the authority and the agreement. The plaintiff, in order to succeed, must establish both points, — the authority and the agreement made in exercise of it.

Both parties, the plaintiff and defendant, were examined under the recent Act of Parliament on the subject of the authority given, or said to have been given, by the defendant. The defendant denies that he ever gave any authority to Mr. Crawter beyond an authority to make a valuation of the property, and to learn from the plaintiff what were the terms he was ready to offer. Mr. Crawter was examined also, and he says the only authority given to him, in the first instance, was an authority to look over the property with a view to letting it to the plaintiff. He then says that he

(a) 11 East, 142.

(b) 2 H. L. Cas. 131.

(c) 7 Ves. 211 b.

did accordingly make a survey of the property, and that he  
 \* 687 made a \* written report on the subject to the defendant, stating, amongst other things, the terms upon which he would recommend the granting of a lease to the plaintiff; that the defendant thereupon said to him: "You must see Ridgway on the recommendation in your report;" and that then a meeting was had between him and the plaintiff, at which that took place which the plaintiff contends amounts to an agreement between him and Mr. Cawter as the agent of the defendant. If what took place between the defendant and Mr. Cawter is to be taken as correctly given in this evidence, there clearly was no authority; for even if the words used by the defendant amounted to an authority to make a contract binding him, it was clearly only to make a contract conformable to the report; but the contract actually made, or alleged to have been made, was materially different from the report. The alleged contract included the triangular piece of land; the report excluded it, and only contemplated a negotiation. It stated that there was no particular inducement to the owner, or advantage that would be served, by entering into such an agreement upon the terms proposed, but recommended the following, as the terms to be offered to Mr. Ridgway; namely, "an agreement for a twenty-one years' lease." And then, having stated what the rent was to be, and that the triangular piece of ground was to be given up, it goes on: "On these terms being proposed, it will probably lead to a negotiation by which a fair rent may be obtained, and some arrangement made to permanently improve the premises, for which there is ample room." If, therefore, the evidence of the defendant and Cawter is to be taken as true, there was no authority.

But then the plaintiff was also examined, and his evidence is, that, on applying to the defendant, the defendant told him  
 \* 688 that Cawter managed all his \* affairs for him, and that he, the plaintiff, was to treat with him; that Cawter did accordingly look over the property, and afterwards had a meeting with him at Carshalton, when he entered into an agreement, on behalf of the defendant, to grant a lease, being the agreement the plaintiff is now seeking to enforce. Taking this to be a correct representation of what really passed, the question whether the defendant did thereby authorize Cawter to agree for a lease, or rather whether the plaintiff is not entitled to consider him as hav-

ing given such authority depends, independently of what afterwards occurred, upon the construction to be put upon the words that "Mr. Cawter managed all his affairs, and that he, the plaintiff, was to treat with him." If this were all, and if upon this the plaintiff had agreed with Cawter for a lease, I should have felt great difficulty in saying that the defendant had represented to the plaintiff that Mr. Cawter had authority to enter into a binding agreement. The language is very equivocal. It might mean no more than that Cawter was to negotiate, which is the interpretation that the defendant and Mr. Cawter both put on what took place, and what adds confirmation to that is the terms of the report to which I have referred. But then there is a circumstance likely to throw some light upon this part of the case; I allude to the conversation between the defendant and Taylor. Taylor, the agent of Meux & Co., says, that on applying to the defendant to grant a lease of the house to Meux & Co., the defendant told him it was irrevocably gone; that he had granted a lease of it to the plaintiff. This conversation, if correctly represented, very strongly tends to the conclusion that the plaintiff rightly interpreted his conversation with the defendant; and that he did rightly interpret it, is further made probable by the fact that in the month of September, 1849, three months after the alleged contract with Cawter, Cawter in his \* letter alludes to the circumstance of Tay- \* 689 lor having been trying to get from the defendant the terms of the agreement between him and the plaintiff. The strong probability therefore is, that the defendant had so expressed himself to the plaintiff as to lead him to suppose he would be bound by whatever Cawter might agree to do, and that he afterwards, when he learned from Cawter what had passed between him and the plaintiff at Carshalton, supposed himself then to have been bound to grant the required lease to the plaintiff. If, therefore, it were necessary to decide this point, I should be strongly inclined to hold that the defendant must be taken either to have given to Cawter an authority to contract, or at all events to have so conducted himself towards the plaintiff as to be estopped from disputing such authority. But I do not think it necessary to decide this point; for even supposing it to be clear that the defendant did give the authority to Cawter, I think it equally clear that Cawter never entered into any binding contract at all: by binding contract, I mean a written contract signed by himself as the defendant's agent.



It was argued that the objection on the Statute of Frauds was not open to the defendant, by reason of his not having insisted on the statute as a defence; but this is a mistake. Where a defendant admits the agreement, if he means to rely on the fact of its not being in writing and signed, and so being invalid by reason of the statute, he must say so; otherwise he is taken to mean that the admitted agreement was a written agreement good under the statute, or else that on some other ground it is binding on him; but where he denies or does not admit the agreement, the burden of proof is altogether on the plaintiff, who must then prove a valid agreement capable of being enforced.

\* 690     \* This is what Lord ELDON adverts to in the case of *Cooth v. Jackson*, (a) which was cited before me; and that such was his meaning is manifest from a consideration of the facts of that case. There the question arose, whether a party who had admitted an agreement could by any mode of proceeding avail himself of the Statute of Frauds, on the ground that an admitted agreement was a case not within the mischief contemplated by that statute. Lord ELDON's reasoning refers to the case of an agreement admitted, and that is manifest from the illustration which he gives. He says, with reference to parol agreements taken out of the statute upon part performance: "If the party has a right to relief in this Court, he has a right to an answer from the defendant to every allegation of his bill; the admission of the truth of which or the proof of the truth of which is necessary to entitle him to that relief. If his title to relief, therefore, stands both upon the fact of a parol agreement and part performance of that parol agreement, there must in some stage of the cause be proof that there was a parol agreement and a part performance of that parol agreement, by which I mean some parol agreement certain and definite in its terms, and to which those acts of part performance can be clearly and certainly referred. If the defendant answers in the first instance, admitting the agreement and saying nothing about the statute, I suppose, if he says nothing about the circumstances of part performance though not craving the benefit of the statute, the plaintiff would not think it material to prove the circumstances of part performance, but would proceed upon that admission, for upon this supposition the

(a) 6 Ves. 12; see p. 87.

Court would decree it. Suppose he prays the benefit of the statute. He must go on to state the acts of part performance: why? If it is the doctrine of this Court that a parol \* agreement, notwithstanding the defendant craves the \* 691 benefit of the statute, is to be executed, why does the Court do such an unnecessary thing as to make him answer as to the part performance; for if there is no difference whether he says any thing about the statute or not, why is not the plaintiff to have a decree in the former case as well as the latter?" And Lord ELDON adds: "Then the most rational way seems to me to be, that if the defendant admits the agreement, but insists upon the benefit of the statute, the statute protects him; if he does not say any thing about the statute, then he must be taken to renounce the benefit of it, and there is no occasion to inquire about the part performance." All that reasoning appears to me to be perfectly clear. It would be absurd for a defendant, denying any agreement at all, to say he relies on the Statute of Frauds, and equally would it be so in the defendant who denies all knowledge on the subject, which may well be the case where the alleged contract is said to have been made by an agent; or in the case of an infant heir-at-law who knows nothing of his ancestor's contract, and against whom a valid agreement must be proved.

It was supposed that the defence of the Statute of Frauds was analogous to the case of a defence arising under the Statute of Limitations. In truth it is altogether different, and the mistake in the view that was taken, or rather the fallacy of the argument, which was very ingeniously pressed is apparent; and the distinction is manifest in considering the nature of the two statutes, and the mode in which from the nature of things they must be treated. The Statute of Limitations says that no action of a certain description, such as an action of assumpsit, shall be brought except within six years after the cause of action has accrued. Suppose an action brought against a party, for that he did undertake and \* promise something within the six years, you must plead \* 692 the statute, otherwise you have no issue raised upon it by the plea of *non assumpsit*. The promise may be proved at any time: the Statute of Limitations therefore must be pleaded, that there may be on the record something to raise the issue under that statute, whether or not the contract was within the proper time. But with regard to the Statute of Frauds, it is altogether

different: that says no action shall be brought whereby persons shall be charged in certain cases, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized. Suppose an action brought against a party for a breach of a contract in having agreed to sell a certain estate, the statute requires a writing signed by the party. The plaintiff alleges that the defendant entered into such an agreement, the answer is he did not; the burden of proof is on the plaintiff to show that the defendant did enter into the agreement; and "the agreement" means a valid agreement (unless there is something to qualify it), which can only be proved by showing a written agreement under the hand of the party or his lawfully authorized agent. The two cases are entirely dissimilar; it seems to me that the one statute affords no illustration towards the interpretation of the other.<sup>1</sup>

This being so, has the plaintiff proved any written agreement signed by Mr. Crawter? The only document which can possibly be argued to come within such a description of a written agreement is Mr. Crawter's letter of the 20th September, 1849. Assuming that there had been a verbal agreement at Carshalton in June, the plaintiff wrote to Mr. Crawter a letter on the 27th

August, pressing Mr. Crawter to send him a copy of the \* 698 agreement, \* to which Mr. Crawter answers thus, on the 20th September, 1849: "Sir, — Mr. Wharton's solicitor had instructions from me long since to prepare the agreement, and I fully expected he had done so; but my absence from town has prevented my seeing him, but will do so in a day or two. Mr. Taylor has been trying to learn from Mr. Wharton the terms arranged with you, but with which neither he nor Messrs. Meux can have any thing to do, and he seems to intimate that Messrs. Meux should have had the refusal of the premises; but I can remind Mr. Taylor they had the offer of them, and he on their behalf declined. It strikes me the less communication you have with Mr. Taylor the better. Yours obediently, HENRY CRAWTER, Jun."

This letter certainly cannot be stronger as an agreement than if he had written: "I have entered into an agreement with you to lease the estate, and I have desired the solicitor to prepare a lease

<sup>1</sup> See 1 Dan. Ch. Pr. (4th Am. ed.) 654.

according to the terms arranged between us." Now I am clearly of opinion that even such a letter would not be a valid contract within the Statute of Frauds; even though the terms had in fact been previously reduced into writing, the statute is not complied with unless the whole contract is either embodied in some writing signed by the party, or in some paper referred to in a signed document, and capable of being identified by means of the description of it contained in the signed paper. Thus a contract to grant a lease on certain specified terms is of course good. So, too, even if the terms are not specified in the written contract, yet if the written contract is to grant a lease on the terms of the lease or written agreement under which the tenant now holds the same, or on the same terms as are contained in some other designated paper, then the terms of the statute are complied with. The two writings in the cases I have put become one \* writing. \* 694 Parol evidence is in such a case not resorted to for the purpose of showing what the terms of the contract are, but only in order to show what the writing is which is referred to. When that fact, which it is to be observed is a fact collateral to the contract, is established by parol evidence, the contract itself is wholly in writing signed by the party.

But here the case is very different; Mr. Cawter (to put the case in the most favourable point of view for the plaintiff) writes that he has agreed to grant a lease on certain terms arranged between him and the plaintiff. What are these terms? The plaintiff undertakes to show by parol evidence that the terms are the terms to be found in a written unsigned paper. It must be open to the defendant to offer counter evidence, to show that the terms arranged were not those contained in that paper, but certain other terms arranged by parol, so that the whole mischief which the Statute of Frauds was intended to meet would be let in.

I should have been clearly of this opinion, even if the case was untouched by decision; but, in truth, it is concluded by authority which has never been questioned. I refer to the case before Lord REDESDALE, of *Clinan v. Cooke*. (a) That is a case in which, as far as it is material to consider it, an agreement had been entered into by an agent to grant a lease; but the agreement did not state what the terms of the lease were to be, or how long it was to be

(a) 1 Sch. & Lef. 22.

held. The agreement was entered into in pursuance of an advertisement in these words inserted in the public papers shortly before the agreement, "To be let for three lives, or thirty-one years, from the 1st day of May next, the lands of Purcell's Gardens, containing," and so on. Then follows the description of \* the lands: "Applications to be made to W. Cooke, Esq., or Edmund Meagher." In consequence of this advertisement Mr. Meagher, being the lawfully authorized agent, signed and agreed to grant a lease at a certain rent "for the remainder of the term," but not stating for what term. The objection was that there was no agreement in writing, and what Lord REDESDALE says on this part of the case is very well worthy of attention. (a) "It is contended that this omission may be supplied by parol evidence, and particularly by reference to the advertisement. The plaintiffs have taken it to be a contract for a lease of three lives; therefore the contract they propose to perform is a contract at the rent expressed in the paper for three lives. Now a reference to the advertisement will not serve their purpose, because the ambiguity remains; for, in the advertisement it is, 'three lives or thirty-one years.' There is nothing in the advertisement that gives a choice to the tenant. Cooke's answer says that it should be either the one or the other, as the party should agree, and the case is perfectly silent as to the fact of any agreement on the point, except as to the plaintiffs having prepared a lease for three lives, for it is not stated in their bill that they meant the agreement to be for three lives, or that Meagher signed it meaning it to be so; for this reason, therefore, it is impossible to connect this agreement with the advertisement. But suppose there were no uncertainty in this particular, and that the advertisement had expressed three lives only, you then are to connect these two transactions: how? by parol evidence. Now, if the agreement had referred to the advertisement, I agree parol evidence might have been admitted to show what was the thing (namely, the advertisement) so referred to, for then it would be an agreement to grant for so much time as was expressed in the advertisement, and \* then the identity of the advertisement might be proved by parol evidence; but there is no reference whatever to the advertisement in this agreement."

(a) See 1 Sch. & Lef. p. 33.

It appears to me that that case exhausts the subject: the point is stated with that distinctness which characterizes all Lord REDFORD's judgments. There are many subsequent cases to the same effect; but I do not think I am called on, or that I should be at all usefully occupying the public time by referring to them. I may, however, remark that there are some distinct observations of Lord DENMAN on the subject in the case of *Dobell v. Hutchinson*. (a) His Lordship there says: "The cases on this subject" (which was how far you might supply by parol evidence matter not contained in the writing itself) "are not at first sight uniform" (that is undoubtedly true. There are cases in which, *per incuriam*, the Court has not adverted to the distinction); "but on examination it will be found that they establish this principle, that where a contract in writing or note exists which binds one party, any subsequent note in writing signed by the other is sufficient to bind him, provided it either contains in itself the terms of the contract or refers to any writing which contains them. Here the letters of the defendants refer expressly and distinctly to the conditions of sale, and they had in their hands, or the hands of their auctioneer at that very time, the conditions of sale signed by the plaintiff, to which reference is made, so that no parol evidence of any kind was requisite to show a contract binding both parties, except evidence of the handwriting of each, which must be adduced in all cases."

It appears to me, therefore, that the principle established by these cases, and, as I have already observed, the principle deducible from the construction and object of the statute if there had been no cases, \* clearly shows that, in order to make a \* 697 contract a binding contract under the Statute of Frauds, it must be either embodied all in one paper, signed by the party; or if not so embodied, there must be some paper signed by the party referring to the paper which does contain the terms, in order that from the writing so signed you may say that is the paper, and incorporate them together and make it one. That is clearly not the case here, because what the terms were is proved by parol evidence; there is no reference to the writing which contains the terms, and, consequently, no valid agreement within the Statute of Frauds.<sup>1</sup> I formed this opinion, I confess, strongly at the time of

(a) 3 A. & E. 355; see p. 371.

<sup>1</sup> When this case came up for decision upon the appeal in the House of Lords,

the argument; but, with deference to the high authority of the learned Vice-Chancellor, who has decided otherwise, I thought it would be more fit to look into the cases, and that further investigation has satisfied me that my first impression was right. In my opinion, therefore, the bill ought to have been dismissed.

There was some argument made upon the circumstance that the defendant had destroyed a letter. I do not impute to the defendant that he has wilfully destroyed any thing that would have been of use or would have furnished evidence against him; but I think it was very indiscreet to have destroyed the letter, it having got into his hands *post litem motam*. I believe him most truly when he says it contained nothing that would have altered the aspect of the case, and at the same time I do not think upon that ground that I should have deprived the defendant of the costs; it does not appear that the plaintiff was thereby induced to institute the suit; but, on the other ground, namely, what the defendant said to Mr. Taylor might well have led the plaintiff to suppose that there was that agreement, on the faith of which he filed his

Lord CRANWORTH, in delivering his judgment, said: "I wish to begin by stating that in my opinion, on the point as to the Statute of Frauds, I came to a wrong conclusion, and I think it infinitely better to state that at once than to do that which would not be creditable to a Judge, and certainly would be extremely inconvenient to the public, to try to explain away and make out distinctions where distinctions do not really exist. I have no hesitation in saying, that upon looking at the case attentively, I think that I did not sufficiently advert to this fact, that the instructions which were sent to Mr. Gregson were written instructions; and the authorities lead to this conclusion, that if there is an agreement to do something not expressed on the face of the agreement signed, that something which is to be done being included in some other writing, parol evidence may be admitted to show what that writing is, so that the two taken together may constitute a binding agreement within the Statute of Frauds." *Ridgway v. Wharton*, 6 H. L. Cas. 238, 256, 257. Lord ST. LEONARDS: "We all seem to agree that if there was a concluded agreement, it was within the statute a sufficiently binding agreement. Upon that we cannot entertain any doubt." 6 H. L. Cas. 274. See 1 Sugden V. & P. (7th Am. ed.) [117] *et seq.*; *Morton v. Dean*, 13 Met. 385; *Adams v. McMillan*, 7 Porter, 13; *Freeport v. Bartol*, 3 Greenl. 340; *Hurley v. Brown*, 98 Mass. 545; *Farwell v. Mather*, 10 Allen, 324; *Murdock v. Anderson*, 4 Jones Eq. 77; *Owen v. Thomas*, 3 M. & K. 353; *Nichols v. Johnson*, 10 Conn. 192; *Atwood v. Cobb*, 16 Pick. 227; *Fitzmaurice v. Bayley*, 9 H. L. Cas. 89; *Peck v. North Staffordshire Railway Co.*, 10 H. L. Cas. 485; *Caton v. Caton*, L. R., 2 H. L. 135; *Xenos v. Wickham*, L. R., 2 H. L. 303; *Baumann v. James*, L. R. 3 Ch. Ap. 508; *Gowen v. Klous*, 101 Mass. 449; *McMurray v. Spicer*, L. R. 5 Eq. 527.

bill, and, under these circumstances, I think the justice of the case would be best met by dismissing this bill, and dismissing it without costs.<sup>1</sup>

\* CROSSE v. The GENERAL REVERSIONARY AND \* 698  
INVESTMENT COMPANY.

1853. December 10, 16, 17, & 19. Before the Lord Chancellor Lord CRANWORTH.

The grantor of an annuity, which was the third incumbrance on his real estates, executed a trust-deed (to which the annuitant was not a party) whereby the estates were conveyed to trustees on trusts for sale to discharge the incumbrances according to their priorities; and the first trust of that deed was to pay the costs of the trustees in the conduct of the sale. After the execution of the trust-deed the trustees applied to the annuitant for his consent to the sale. In answer to that application the solicitors of the annuitant offered to facilitate the sale, but asked for a copy of the trust-deed; adding: "When we have seen the deed we shall be better able to inform you whether our clients will have any difficulty in joining in the conveyances." And, in answer to a subsequent application, they assented to the appropriation of a part of the rents toward rendering the property more eligible for sale. Part of the property was sold, the annuitant concurring in the sale, whereby a sufficient sum was realized to pay the prior incumbrances; but it being apprehended that the residue of the property would not realize enough to pay both the costs of the trustees and to redeem the annuity, the trustees applied to the annuitant for leave to retain, in the first place, out of the future proceeds of sale, a sum sufficient to pay their costs. This being refused, and a bill being filed to compel the annuitant to join in the conveyances, *held*, under the circumstances, that he was not bound to do so, except upon the terms of having the annuity redeemed.

THIS was an appeal by the defendants, the Reversionary Company, from a decree of the Vice-Chancellor STUART, made on the

<sup>1</sup> The decree in this case was affirmed in the House of Lords (6 H. L. Cas. 238), upon the grounds that Mr. Crawter was not authorized to make the contract, and that there was no concluded agreement, upon both of which, however, Lord ST. LEONARDS dissented; upon the former ground he remarked: "Upon the whole, then, I am clearly of opinion that Crawter was the fully authorized agent of Wharton in this matter;" and upon the latter he said, "I have never seen a more concluded agreement, as it appears to me, than is made out by the previous evidence in this case, and is contained in this document. It contains every thing. It would be a sufficient agreement to be specifically performed in a Court of Equity without the least doubt being thrown upon it."



14th July, 1853. The plaintiffs, Andrew Crosse and Charles Baker, were the trustees under a trust-deed executed by the defendant, Charles John Kemeys Tynte, on 9th March, 1847, whereby certain estates belonging to C. J. K. Tynte had been conveyed to the plaintiffs upon trust for sale. The estates were at that time subject to two mortgages amounting to 90,000*l.*, and to a term of 500 years which had been demised by the defendant C. J. K. Tynte for the purpose of securing during his life to the defendants, the Reversionary Company, an annuity of 3545*l.* The object of the trust-deed was to realize a sum sufficient to redeem the annuity, and to pay off all the incumbrances on the estate.

The trust-deed provided that the proceeds of the sale were \* 699 to be, in the first place, applied "in reimbursing \* the trustees, and allowing to each other, and in paying and satisfying to all other persons whomsoever all such costs, charges, and expenses as should or might be paid, sustained, incurred, or expended in or about or preparatory to the sale of the said several premises, and in or about the making out, establishing, or completing the title thereto respectively, and in enforcing the performance of any contracts," &c., and then, according to their priorities, in the satisfaction of the two mortgages and the redemption of the annuity.

The bill stated that divers letters were written and sent by, and passed between, Messrs. Baker & Co., the solicitors of the plaintiffs, and Messrs. Beavan & Anderson, the solicitors of the Reversionary Company, and Mr. Hodge, their actuary and secretary, with reference to and for the purpose of the Reversionary Company giving their consent to the sales proposed to be made under the trust-deed for sale, and joining in the conveyances, surrenders, and assurances necessary to the completion of such proposed sales; and in particular that Messrs. Baker & Co. did, on the 27th August, 1847, write to Mr. Hodge the following letter: "Dear Sir, — You will recollect that in March last an annuity of 3545*l.*, payable to the Reversionary and Investment Company, was charged by Mr. Tynte upon his Maindee estate and other property subject to prior incumbrances thereon, amounting to 90,000*l.* Mr. Tynte at the same time executed a deed of trust for sale of the Maindee estate similar to that he had previously executed, and the trusts are the same, (that is) out of the proceeds of the sale to pay off all the incumbrances on the estate. The trustees have been called upon to carry this into effect, and the primary object in view is to pay off

the two mortgages for 90,000*l.*, which are charges prior to the annuity to your company. Having regard to the circumstance that the annual \* value of the estate is greatly in- \* 700 sufficient to pay both the interest upon the mortgages and the annuity, the trustees feel bound, and are advised, to proceed to an immediate sale, and active measures are now in progress for that purpose; on behalf of the trustees we beg therefore to inquire whether the General Reversionary and Investment Company will be ready to concur, should it be necessary, in the conveyances to the purchasers, on seeing that the whole of the purchase-moneys are duly applied in liquidation of the prior charges on the estate, and afterwards in redemption of the annuity and payment of the arrears thereof. We must request at the same time you will be good enough to receive this as a notice that the trustees intend to repurchase the annuity, upon the terms of the deed, at the expiration of fourteen days from the 9th March, 1848, the period when the redemption money becomes payable. If previously to that time the produce of the sales should be sufficient to discharge not only the prior mortgages, but the redemption money, arrears of annuity, and costs, we presume that the General Reversionary and Investment Company will not object to receive the whole amount due to them before the stipulated period. We are, &c., BAKER & Co."

On the 14th September, 1847, the secretary wrote to the solicitors of the plaintiffs, informing them that the board had referred their communication to the solicitors of the Reversionary and Investment Company, and on the 30th September, 1847, their solicitors, Messrs. Beavan & Anderson, sent the following answer to Messrs. Baker & Co.: "*Gentlemen,—Re Tynte.* With reference to your communication to the secretary of the General Reversionary Company of 27th August, and the subsequent letters to ourselves on the subject thereof, we think you had better let us have a copy of the trust-deed referred to by you, under which, as we understand, you contemplate \* making sales \* 701 in which you anticipate our clients may be called upon to concur. When we have seen that deed we shall be better able to inform you whether our clients will have any difficulty in joining in the conveyances. We need not say that, as far as we are concerned, we shall be ready to give every facility in our power to

whatever arrangements you may propose with regard to the sales. We are, &c., BEAVAN & ANDERSON. — Messrs. Baker & Co.”

On the 6th April, 1848, Messrs. Baker & Co. wrote the following letter to the secretary of the Reversionary Company: “Sir, — After paying the interest to the West of England Insurance Company, which is now discharged<sup>d</sup> up to the 4th of last month, there is a balance of 100*l.* 5*s.* 3*d.* applicable to the payment of the annuity to the Reversionary Company. There are arrears due from the tenants to some extent, and we have not been able to come to a settlement with the South Wales Railway Company for the land agreed to be sold to them. But in making the necessary arrangements for the sale, which is to take place in June next, it has been found indispensable, with a view to make the property as productive as possible, to lay out that portion of land near to and adjoining the town of Newport as building land, and we are advised that it cannot be sold with any advantage unless the roads are previously made by the vendors. The estimated expense of forming the roads is 110*l.* 8*s.* 11*d.*, and our proposal on behalf of the trustees for sale is that your company should forego the payment at the present moment of the trifling sum now in hand (100*l.* 5*s.* 3*d.*), and the arrears to be collected between this period and June next, and that the trustees should then take upon themselves the whole outlay for the roads, which they will at once proceed to make. This arrangement involves no sacrifice

\* 702 on the \* part of the company, except in deferring a small payment for a short period, as they are entitled to charge interest on the arrears of the annuity. If carried out immediately, the estates will, we are advised, produce a sufficient sum to pay off all the charges subsequent to yours. We are, &c., BAKER & Co. To W. B. Hodge, Esq.” On the 3d May, 1848, and in answer to the letter of the 6th April, Messrs. Beavan & Anderson wrote thus to Messrs. Baker & Co: “With reference to your letter of the 6th April, addressed to Mr. Hodge, we beg to inform you that the directors of the General Reversionary Company are willing to forego the immediate payment of the arrears of rent now in hand, provided the subsequent incumbrancers’ consent shall be obtained to the arrangement proposed in your letter, and we have further to inform you that on the part of Mr. Beavan we have no objection to the course proposed, as we are satisfied that the making of the

roads as contemplated will tend to increase the value of the property."

On the 6th May, 1848, Messrs. Baker & Co. again wrote to Messrs. Beavan & Anderson: "Gentlemen, — Maindee estate — In acknowledging the receipt of your letter of the 3d instant (which is quite satisfactory to the trustees) on the subject of the roads, we beg to say that there is a further sum to be provided for in order to obtain possession of the land which is indispensable as an approach from the town of Newport to the building ground. This portion of the estate was under lease, and upon the treaty for its surrender no less a sum than 1200*l.* was required, but we have ultimately succeeded in procuring a surrender of the lease from the tenant for 542*l.* This was thought by those employed for the trustees, and particularly by Mr. Morris, the eminent surveyor at Newport, a very beneficial purchase. To enable you to form a judgment upon the subject, we \* send for your \* 708 inspection the plan of the building ground as now laid out, which it is intended to lithograph, and add to the particulars of this part of the property. The arrangement of these farms (part of the old park) as building land will, we are advised, add very considerably to the produce of the sale. In addition to the 1103*l.* for forming the roads, the 542*l.* for purchasing the lease has to be added; and it is the sanction of your clients to this further outlay which is the object of our present application. We beg you to understand at the same time, that the total sum thus required (1645*l.*) is not likely to be obtained from the rents, but will have, in part at least, to be advanced by the trustees. We beg to be favoured with as early a reply to this application as may be convenient to you. We are, &c., BAKER & Co." In answer to this application, and on the 23d May following, Messrs. Beavan & Anderson wrote as follows: "Our clients are not disposed to raise any objection to the application of the sum of 542*l.* towards the purchase of the tenant's interest in Fair Oak Farm, provided the subsequent incumbrancers' consent be obtained."

The bill stated that, after the receipt of this communication, the plaintiffs expended 1786*l.* 6*s.* 8*d.*, out of the moneys received for the rents of the estate, in constructing the roads and laying out the building plots, and in purchasing the tenant's interest; and that, in other respects, the plaintiffs, with the knowledge and privity of the prior incumbrancers, had proceeded with the

arrangements for the proposed sale, particularly by preparing, publishing, advertising, and circulating, as was well known to the prior incumbrancers, printed particulars and conditions of the proposed sale.

In August, 1848, nearly the whole of the estate was sold  
\* 704 \* by auction in various lots, and between that time and August, 1850, the remainder of the estate was sold. By the conditions of sale, subject to which all the purchases were made, it was provided that the incumbrancers and their trustees should be made parties by and at the expense of the purchasers to the respective conveyances, and surrenders to be made to them, and the vendors should not be required previously to completion to procure reconveyances or surrenders, by any of such incumbrancers or their trustees.

The bill stated that no objection was made to the printed particulars or conditions of sale or dissent therefrom expressed by the prior incumbrancers or any of them, and in particular not by Messrs. Beavan & Anderson, nor by the Reversionary Company, nor by any director, trustee, or other officer of the Reversionary Company; nor were the sales made thereunder repudiated by the incumbrancers or any of them; but that, on the contrary, a large number of sales, effected under the said conditions, of lots described in the particulars, had from time to time been completed by deeds of conveyance or other instruments reciting the particulars and conditions of sale, and carrying out the same, and which deeds of conveyance or other instruments had been from time to time approved of by the solicitors of the prior incumbrancers, and in particular by Messrs. Beavan & Anderson, on behalf of the Reversionary Company and the directors and trustees thereof, and from time to time had been executed by the trustees for the time being of the same company who were competent to join therein in respect of the annuity and the securities for the same.

After setting forth the receipt of large sums of money  
\* 705 from time to time on account of the purchase-money, \* the bill stated that the costs incurred by the directors and the trustees of the Reversionary Company, by reason of their joining in the assurances, and their solicitor's charges attending the same (except the portion thereof which the conditions of sale required the purchasers to pay), were from time to time required by the company to be and in fact were paid by the plaintiffs out of

the proceeds of the sales or other the funds in the hands of the plaintiffs as such trustees, but that the plaintiffs had not yet been paid their costs of the sales; and that it being certain much more than sufficient would remain of the proceeds of the sales after the discharge of the prior mortgages for payment of the costs of the sales, and the costs being only partly ascertained at the time of completing the purchases, it was not considered by the plaintiffs material to deduct the costs of the sales (other than the costs which the Reversionary Company required to be paid) out of the purchase-moneys before paying off the prior mortgages.

The plaintiffs having out of the moneys realized by the sales discharged the two prior mortgages amounting to 90,000*l.* together with the costs of the mortgagees, Messrs. Baker & Co., on the 8th December, 1851, wrote to Messrs. Beavan & Anderson as follows: "Dear Sirs,—Maindee estate—As the time is now nearly arrived when the remaining sales of this estate will be completed, we have thought that it may facilitate the settlement of the drafts of the purchase deeds to remind you of the necessity of making provision for the costs of the sales, as well as the incumbrances, out of the purchase-moneys remaining to be received. We assume the proper course after the balance of principal, interest, and costs to the West of England Insurance Company shall have been paid will be to apply the remaining purchase-moneys according to the trusts declared by the deed \*under which \*706 the estate has been sold; viz., first, in paying the costs of the sale; secondly, in discharging the prior mortgages for 90,000*l.*; thirdly, in paying the arrears of annuity due to the Reversionary Company, and the surplus to be invested agreeably to the provisions of their annuity deed. We shall be glad to hear from you as soon as may be that this is what you consider to be the understanding between the vendors and your clients. We shall then be able to arrange with the purchasers the form of their purchase deeds, in reference to the application of the purchase-money. We are, &c., BAKER & Co." In reply to which Messrs. Beavan & Anderson, on the 20th December, 1851, wrote as follows: "Your letter of the 8th inst., on the subject of the costs of sale of Mr. Tynte's Maindee estate has been under the consideration of the board of directors of the General Reversionary Company; and we are instructed to inform you that the directors cannot consent to the payment of the costs in question in priority to the claim of the

company under their securities. We are, &c., BEAVAN & ANDERSON."

The proceeds of the sales not being sufficient to redeem the whole of the annuity, besides paying the costs and expenses of the sales, the defendants, the Reversionary Company, refused their consent to the payment of the costs incurred by the trustees to the prejudice of their security, and declined to join in or execute any further conveyances after the amount due to the previous mortgagees of 90,000*l.* had been discharged, unless such further conveyances were so framed that the balance of the purchase-money should be made available for the security of their annuity, and unaffected by the plaintiffs' claim. The bill alleged that inasmuch as the defendants, the Reversionary Company, had from time to

time received the full amount of all costs incurred by  
\* 707 \* them in and about the sales, and had not intimated or notified that they should object to the costs of the plaintiffs being in like manner paid, they had waived their priority, if they ever had any.

The bill also alleged that the prior mortgagees, the West of England Company and George Leeke Baker, had power under their securities to pay the debts due to them by means of sales of the estates, and to pay in the first place the costs of such sales out of the proceeds thereof; and that they had in fact been paid off by means of the sales of the estates effected with their co-operation and concurrence as aforesaid, and that there was no other way of paying off their debts than a sale of the estates, and, therefore, that the costs of the sales had priority as a charge over the annuity granted to the Reversionary Company. The bill after stating that several of the purchasers had claimed to be at liberty to rescind their contracts, the completion of which was only delayed by the refusal of the defendants, the Reversionary Company, to concur, prayed a declaration that they ought to join in completing and carrying into effect the sales at the expense of the trust estate; and that the costs, charges, and expenses of the plaintiffs in carrying out and completing the sales were a charge upon and ought to be borne by the moneys arisen from the sales.

This case came originally before the Vice-Chancellor on a motion of the plaintiffs, that the defendants, the Reversionary Company, should join in the conveyances; but, on the suggestion of the Vice-Chancellor, the question was treated as being brought

before him as on the hearing of the cause, and upon the affidavits of the secretary and solicitors of the defendants, the Reversionary Company. It was in evidence that on the 7th July, 1849,

\* Messrs. Baker & Co. had written to Messrs. Beavan & \* 708 Anderson, informing them that an arrangement had been entered into between the prior mortgagees and the plaintiffs for enabling the plaintiffs to retain out of the purchase-moneys then to be received 4000*l.* on account of the trust expenses, and adding that such sum would be applicable to the payment of the costs generally, including those of the defendants, and asking their consent to such an arrangement. On the 23d July, Messrs. Beavan & Anderson wrote, declining to accede to the arrangement.

In support, however, of the plaintiffs' case, one of the draft conveyances containing a recital that the sales had been made with the consent and approbation of the defendants, and which had been executed by the defendants after the 23d July, 1849, was relied upon. It appeared by the affidavit of Mr. Anderson, the defendants' solicitor, that the plaintiffs had proceeded to sell the estate without waiting to obtain any promise of concurrence from the Reversionary Company, and that at the time when the sales were made, the Reversionary Company, though informed of the existence of the trust-deed by the letter of the 27th August, 1847, were ignorant of the trusts therein contained for the payment of the trustees' costs, and that, in fact, till the 8th December, 1851, the company had not any intimation from the plaintiffs that they were about to appropriate any part of the purchase-moneys in payment of the plaintiffs' costs, before providing for the redemption of the annuity. With respect to the recital in one of the draft conveyances to the effect that the company had concurred in the sale, he swore that such recital had escaped his notice; that it was the only one out of forty which had been executed by the defendants which contained such recital.

\* *Mr. Walker, Mr. Malins, and Mr. W. D. Lewis*, for the \* 709 plaintiffs, in support of the Vice-Chancellor's decree. — The general rule, in cases of this sort, is, that a party may deny the right to deduct costs, provided he can claim the estate if unsold, on the ground that he need not incur costs of sale. Here, however, the defendants could not have prevented a sale by the prior incumbrancers, and having clearly authorized the sale, and taken



the benefit of the proceedings for the advantage of the whole body of creditors, they must contribute to the costs. *Kenebel v. Scrafton*, (a) *White v. The Bishop of Peterborough*. (b) They are in the situation of a mortgagee who seeks for something more than by his contract he is entitled to; as where he adopts a suit for the general administration of an estate which proves deficient: in which case the costs are clearly payable in the first instance out of the estate. *Armstrong v. Storer*. (c)

They also referred to the cases of *Wild v. Lockhart*, (d) *Hepworth v. Heslop*. (e)

*The Solicitor-General* and *Mr. Cole* appeared on behalf of the defendants, the Reversionary Company, in support of the appeal. — The sale in this case was made without notice to the defendants, against whom, from the first intimation of the trust-deed in August, 1847, down to December, 1852, there is not a particle of evidence to show that they consented to the provision in the

\* 710 deed, which the \*bill here seeks to enforce. The case of

*Wild v. Lockhart* (d) is clearly distinguishable; for there the sale had been consented to by the mortgagee. They relied upon the authorities of *Upperton v. Harrison* (g) and *Barnes v. Racster*. (h)

*Mr. Toller* appeared for *Mr. Tynte*.

*Mr. Walker*, in reply.

THE LORD CHANCELLOR. — If the arguments of this case had commenced and closed on the same day, I should undoubtedly, not only for my own satisfaction, but in deference to the very high authority by whom the decree has been pronounced, have taken time to deliberate and consider the case in all its bearings, before I came to the conclusion that I ought to reverse that decree; but it has now occupied altogether four days in argument. I have had the papers home with me, and have had full opportunity of examining

(a) 13 Ves. 370.

(b) Jacob, 402.

(c) 14 Beav. 535.

(d) 10 Beav. 320.

(e) 3 Hare, 485.

(g) 7 Sim. 444.

(h) 1 Y. & C. C. C. 401.

the whole of the pleadings together, with the authorities to which I was referred. Having done so, it would now be mere idle waste of time if I were not at once to state that I cannot concur with the judgment to which the learned Vice-Chancellor has arrived. I think the decree he has pronounced has proceeded on erroneous grounds ; and under the circumstances to which I have alluded, I am quite sure it will not be considered as any sort of disrespect to him if I at once state my opinion.

The object of the bill is, in the first place, to bind the Reversionary Company to concur in the completion of \* the \* 711 sale of certain lots or pieces of property sold by the plaintiffs in the year 1848 ; and, secondly, to oblige the company to concur in the completion of those contracts upon the terms that the purchase-money arising from those sales should be in the first place applicable to discharge the expenses of the sale. I have come to the conclusion that there is nothing to warrant either of these propositions ; there is nothing to warrant the proposition that the defendants are bound to concur in the sale, and of course nothing to warrant the proposition that they are bound to concur, and to allow a certain portion of the purchase-money to be applied in the first place to discharge the costs of the sale. Upon the first of these propositions I have had at times considerable doubt, but that is the conclusion I have eventually arrived at. I trust, however, from what has passed, that, notwithstanding the opinion which I have expressed, the Reversionary Company will not act in a mode so as to question the propriety of these sales. I think, although the company was not in my opinion literally bound to adopt them, yet that it was very reasonable for the plaintiffs to have supposed that inasmuch as the Reversionary Company had approved of so many of the contracts of sale and conveyances, they would have approved all others that stood in a like position where sales had been made ; and I trust that, on receiving the purchase-money, they will join in completing such sales.

I will not proceed to state why it is I think they are not bound to complete upon any terms short of receiving the whole of the purchase-money to the extent of their claim. In the first place, it is quite clear they were not parties to the contract of sale ; but parties to a sale, though not parties to the contract, may so conduct themselves as to be estopped from saying that they are

\* not bound to act as if they had been parties to the con- \* 712

tract; no doubt that is a perfectly correct proposition both at law and in equity. But with the generality in which that proposition is sometimes enunciated I cannot concur. It is going much farther than authority or common sense warrants to hold, that a person by standing by binds himself to complete that which other persons are doing upon the faith that he will not prevent its being done. Standing by and doing nothing may be like silence, which is sometimes as eloquent as any words. But the mere fact that a person has done nothing, and that somebody else is doing an act which cannot be perfected except with the concurrence of the person standing by, cannot give a right against him; otherwise this most extraordinary result would follow, that by saying nothing to the person whose consent may be necessary, and by proceeding to do an act with the chance of his being compelled to adopt it by reason of his standing by, his consent would be inferred in the very case in which, if it had been asked for, it would have been refused.

Now, what has the Reversionary Company done to bind itself to the completion of these contracts? It appears that they obtained their security on the 9th March, 1847, which security consisted of the grant of an annuity for a large amount secured for Mr. Tynte's life by a term of 500 years. The property of Mr. Tynte was subject to a prior charge of 90,000*l.*, or rather, to be quite accurate, to two amalgamated charges, one of 85,000*l.* and the other of 5000*l.* As, however, the produce of the sale has been sufficient to pay off both those incumbrances, they may be treated as one incumbrance amounting to 90,000*l.*, and prior to that of the Reversionary Company.

\* 713     \* Immediately after the execution of the deed whereby the annuity of the Reversionary Company was secured, and on the same day, Mr. Tynte, who was the owner of the fee, or rather the owner of the equity of redemption, created a further charge by conveying the property, subject to the prior charges for 90,000*l.* and the annuity of 3545*l.*, to two trustees, the present plaintiffs, as trustees for sale; that must mean to sell what was conveyed, namely, the fee-simple, having regard to the prior incumbrances, and out of the proceeds of the sale in the first place to pay all the costs of the sale, and then to pay off the incumbrances in their order, including two other mortgages posterior to that of the Reversionary Company, amounting to between 20,000*l.*

and 30,000*l.*, and as to the ultimate surplus if there should be any (in fact there was none at all), for Mr. Tynte himself.

The trustees of Mr. Tynte, thinking it was their duty to pay off the subsequent incumbrances (and they must for this purpose be treated as merely acting as agents for Mr. Tynte, or for Mr. Tynte and the subsequent incumbrancers: in one or other of these lights they were certainly acting), and considering how they could most expeditiously get the property sold to relieve Mr. Tynte from the pressure of this large annuity, write the letter of the 27th August, 1847, on which both parties have relied in support of their cases. The terms of that letter are important; it was written by the Messrs. Baker, the plaintiff's solicitors, to the secretary of the Reversionary Company.

[His Lordship here read the letter, see page 699, *ante*.]

That letter was written in August, and being in the long vacation, and from the necessity of communicating with the board, remained unanswered for four or five weeks, but on 30th September, Messrs. Beavan & Anderson wrote to Messrs. Baker & Co. the letter which is the foundation of the \*plaintiff's \*714 case, and it is material to consider what is the true interpretation of that letter. If that letter amounted to what is contended for on the part of the plaintiffs, no question about standing by or conduct can arise. The argument amounted to this, that that was a contract on the part of the company, or those entitled to bind the company, that they would concur in the sales intended to be made. I think it amounted to nothing of the sort. Observe who their clients were. They were a company who managed their affairs by a board of directors and their secretary. Letters passed sometimes to the solicitors, but in regular course they passed to the secretary of the company, and were submitted to the board, and then to the solicitors, who seemed ultimately to have received the communication of the 27th of August, and to have written the answer on the 30th of September, which was as follows: "With reference to your communication to the secretary of the General Reversionary Company of the 27th of August, we think you had better let us have a copy of the trust-deed referred to by you, under which, as we understand, you contemplate making sales, in which you anticipate our clients may be called upon to concur." That

was the deed which was made behind the back, so to speak, of the Reversionary Company. "When we have seen that deed we shall be better able to inform you whether our clients will have any difficulty in joining in the conveyances." Up to that time there certainly is no consent at all. They say, You tell us you are trustees under a deed to sell; when you send us a copy, we shall be better able to tell you whether we can advise our clients to consent. Then follows this passage: "We need not say, as far as we are concerned, we shall be ready to give you every facility in our power to whatever arrangements you may propose with regard to the sales." Following out the sentence as to what advice

\* 715 they would give to their \* clients, I cannot assume that that was meant to be any thing like a written consent, or that it amounted to any more than a courteous way between solicitors of saying, "Let us know what are the terms on which you are proposing to sell, then we will try and do the best we can for you. We are anxious to serve you as well as we can, and when we know what the deed is, we will see how far we can advise our clients to co-operate with you." So matters stood, and nothing further was done until the 5th of April, 1848. A portion of the property was near the town of Newport, and Mr. Farebrother, the auctioneer, being of opinion that it would be obviously for the interests of the vendor that it should be sold in building lots, and a necessary preliminary to that being that it should be surveyed and laid out with roads, the trustees, considering how they could put themselves in funds to make those roads, took into their hands the receipt of the rents. They had kept down all the interest on the mortgages, and there remained in their hands on account of rent a small sum of £100, which was such a drop, as far as the Reversionary Company was concerned, that it was quite unimportant whether it was applied in payment of their arrears, or was otherwise applied. The Reversionary Company had not taken possession, but they had a power of distress, and they might have distrained for rent at any time, but they did not choose to distrain, knowing that Mr. Tynte, the grantor of their annuity, was by himself or those who claimed under him receiving the rents. They might not have been able to claim by-gone rents, but the future rents they might interfere with without taking possession of the estate. Accordingly the plaintiffs' solicitors, by their letter of the 5th April, 1848, wrote, stating the difficulty they had about making the

roads. They stated that they had that very small fund in hand, and that they proposed to apply it, together with the rents which \* would accrue up to the next Midsummer, amounting \*716 to about 1100*l.*, in making these roads; that they could not do so without the consent of the Reversionary Company; that the other incumbrancers had consented, and that it was for the common interest of everybody concerned in the estate to make the most of it; and under these circumstances they asked the Reversionary Company to give their consent. That was a most reasonable application. Mr. Walker infers from that that the company must have known that the sales were made under the trust-deed; that they must have known it was not Mr. Tynte, but the trustees, who were making the sales. I think it very probable they did infer it, but I do not see in my view of the case that that bears very much on the principle which is to govern my decision. Mr. Walker's argument is, that, inasmuch as the trust-deed was the only deed which authorized them to have the rent in their hands, the Reversionary Company must have known that the trustees were acting under that deed. Be it so; it was a matter of perfect indifference to the company whether Mr. Tynte was selling the estate, or whether it was conveyed to trustees. I dare say they knew it had been conveyed to trustees for sale. They knew there were incumbrancers after themselves, and they may very likely have thought it was conveyed to trustees to sell, to pay those subsequent incumbrancers. About a month, however, after Messrs. Baker's application Messrs. Beavan & Anderson wrote to them as follows: "With reference to your letter of the 6th of April, addressed to Mr. Hodge, we beg to inform you that the directors of the General Reversionary Company are willing to forego the immediate payment of the arrears of rent now in hand, provided the subsequent incumbrancers' consent shall be obtained to the arrangement proposed in your letter; and we have to inform you that on the part of Mr. Beavan, we have no objection to \*the course \*717 proposed, as we are satisfied that the making of the roads as contemplated will tend to increase the value of the property." I think that was a very reasonable letter to write. The inference I also think from it is very strong, almost irresistible, that they knew there were subsequent incumbrancers for whom the plaintiffs were trustees, and it clearly amounted to a consent that the rent in hand, and to accrue up to the Midsummer following, should be

applied in making the roads. Then there is another letter from Messrs. Baker & Co., stating that it was not only necessary to make the roads, but that there was an outstanding lease, the holder of which was trying to make very exorbitant terms, but informing the Reversionary Company that the plaintiffs had ultimately succeeded in obtaining the surrender of the lease for 542*l.*, that they had not got the sum requisite for the purchase, but that it would have in part to be advanced by the trustees, and desiring the consent of the Reversionary Company to that also. About a fortnight after, on the 23d of May, 1848, Mr. Anderson writes again: "Our clients are not disposed to raise any objection to the application of the sum of 542*l.* towards the purchase of the tenant's interest."

Now, up to that time what does all which had taken place amount to? In my opinion, to nothing more than that the Reversionary Company believed that the person who had created their incumbrance had probably created subsequent incumbrances and was proceeding to a sale, and they knew that they had been asked whether they would consent to such sale, and that they had said, We will give every facility we can, but before we do any thing we must see the deed. It was contended that they must have known the nature of the deed, because they were told it was the same as

another deed stated in the abstract, which, if they had  
 • 718 looked at their own abstract, \* they would have seen. But they wanted to know what the exact deed was. They said in effect, We are perfectly content with matters as they are. We are going to offer no unreasonable obstacle to the course you propose, but show us the deed, and then we may concur. In the mean time you say it is necessary to lay out a sum of money which you have in hand and the subsequent rents; do that, and we shall never call it in question if the other incumbrancers after us agree.

That being the state of things in May, 1848, it is not pretended that any thing else took place up to the time of the sale, except that it is said the particulars and conditions of sale were known to the solicitors of the Reversionary Company. Assuming them to have had notice of the conditions of sale, I am at a loss to know what they disclose. They merely disclose that they were selling as trustees, and claiming under Mr. Tynte behind the back of the Reversionary Company.

After the sale had taken place nothing further was done until November, 1848. I should state that before that time the plain-

tiff's solicitors wishing to complete the contracts, having sold a great number of small lots as quickly as possible, wrote to the solicitors of the company, saying: "We hope you will have your deed ready to be examined by the purchasers, because they will all want you to be conveying parties, and for that purpose they must look at your deed:" and this was assented to on the part of the Reversionary Company.

In the month of November, some drafts are forwarded for the approval of the company; and in those drafts purporting to be conveyances of certain of the lots the sale is stated to be in consideration of so much purchase-money paid to the prior incumbrancers, and to those \*drafts Mr. Anderson, on \*719 behalf of the company, assents. There is no objection. He takes it for granted that Mr. Tynte, or Mr. Tynte's trustees, as he calls them, are putting the property up for sale through Messrs. Farebrother, so as to get the most for it, and probably the most has been got for it. So it went on with one exception, with respect to all the conveyances, amounting to no less than forty in number. Of course those deeds were all prepared by the respective purchasers. I may observe that on one occasion, when Messrs. Baker asked the solicitors of the company to give a general consent to all the deeds which should from time to time be submitted for their approval, they answered that the board declined to authorize in the dark an assent to any conveyance which they had not previously approved of. I dare say they had no intention of raising any difficulty about the sales, and that they intended only to say, We do not consider ourselves bound to any thing; we wish to give you every facility, but it must be a consent *pro hac vice*. So matters proceeded down to the month of July, 1849. A great number of conveyances were assented to from time to time, all making the purchase-money payable to the prior incumbrancers. At that time a sum nearly sufficient had been received to satisfy the incumbrancers prior to that of the Reversionary Company, and in that state of things an application was made by Messrs. Baker, as the solicitors of the vendors, to Messrs. Beavan & Anderson, asking leave to retain a sum of money towards the expenses of the sale. So far as I can see that was the first time that any suggestion had been made to Messrs. Beavan & Anderson on the subject of the costs of these sales, or that any thing had occurred to lead them to suppose that the costs were to be borne by any



other person than the person who had created the incumbrances, or the plaintiffs claiming under him. Whatever was said

\* 720 in the year 1849, or \* after the sales in 1848, is unimportant, except so far as it may throw light on what had been done or said prior to those sales; for that purpose it might be important, but certainly the letter of July, 1849, does not lead to the inference that the plaintiffs had been up to that time acting on the notion that they were to have the costs of the sale in priority to the incumbrance of the Reversionary Company; nor indeed that any thing had been done at a previous stage sanctioning that which was then asked for; it seems to be a thing for the first time brought to the attention of Messrs. Beavan & Anderson. They are in that letter informed that an arrangement had been entered into for enabling the trustees for sale to retain out of the purchase-moneys yet to be received for lots already sold 4000*l.* on account of the trust expenses, which was to be applicable to the payment of the costs of the sales generally, including the costs of the Reversionary Company. On the 23d July, 1849, Messrs. Beavan & Anderson, by letter, signify a refusal on the part of the company to assent to such an appropriation of the purchase-money. I am of opinion, therefore, that up to that time there was nothing, as I have already stated, to bind them to assent to the sales which had taken place; and even if I were wrong about that, I am clearly of opinion that there was not any thing to bind them to allow the purchase-money to go in discharge of any costs, or in any other way than first of all in liquidating the prior incumbrances, and then in liquidating their own.

Thus matters stood at that time. All that passed afterwards is quite unimportant, unless there be something from which it can be inferred (in spite of the interpretation which the previous letters and conduct of the parties have led me to form) that the

Reversionary Company did assent to the sale and the

\* 721 \* appropriation of the purchase-money as contended for by the plaintiffs. Without going into all the details of the case, I conceive there is nothing at all in the evidence to lead me to any other conclusion. The statement of Mr. Anderson all along was, "I never agreed to any thing. I now hold the same language I have always held. I wish to give you every facility, but I never had such a notion as by giving you facility I meant to forego any right to get my clients paid."

The conduct of the company has been throughout consistent with the language of Mr. Anderson, though there has apparently been one exception; namely, in the conveyance to Mr. Cave, in which there is a recital that the sale had been made with the consent of the Reversionary Company. It is to be observed, however, that although that conveyance was made and approved of by the solicitors of the Reversionary Company in August, 1849, yet that one month prior to that the company had announced that they did not accede to such a view of the matter; they stated courteously, but firmly, in July, 1849, that they declined to recognize it, for that is the interpretation I put on the answer which they sent to the letter of the 7th July. It is very true that there might thus have been a recognition by matter subsequent of a previous consent to a sale of the whole; but even if that were so, I do not think it would touch the question of how the purchase-money is to be applied; it might go to bind the company to complete the sales, but I do not think that of any importance; nor can I consider that a safe ground (if that were the question) on which to decree a specific performance. Having regard to what Mr. Anderson says on that subject, which is so extremely natural and so very likely to be the truth, I cannot but place implicit credence in his statement, and the more especially as he \* is \* 722 not met on that point by any counter affidavit. When his attention is called to that particular recital in the draft which was made after the company had repudiated any obligation to pay the costs, and of course, therefore, any obligation to complete the sales, he says: "I am astonished at seeing such a recital; there have been forty drafts submitted to us at different times, and this is the only one that contains such a recital." It is not very important whether the purchaser chose in drawing the conveyance to say it was with the company's consent or not; it would not strike Mr. Anderson as being very important if his attention had been drawn to it in any one of the forty conveyances, but when his attention is drawn to it, he says: "I never meant to state that which should be a retrospective means of establishing against the company that they had consented to something," which he swears they never did consent to. It seems to me that that is a clear statement.

The result, therefore, in my opinion, is that the very learned Judge from whose decision this appeal is brought, and for whom I

entertain every sense of respect, has miscarried in this case; and I must not shrink from stating that I think the whole bill is framed upon an erroneous ground; that the plaintiffs have not established a case to bind the company to complete the sales, and still less to complete them upon the terms that the purchase-money arising from such sales should be in the first place applicable to discharge the expenses of the sales; and under such circumstances I am of opinion that the bill ought to have been dismissed with costs.

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\* 723 \* In the Matter of The CLERKS OF RECORDS AND WRITS.

1854. January 13. Before the Lord Chancellor Lord CRANWORTH and the Lord Justice TURNER. (a)

Oaths may be administered by the commissioners appointed to administer oaths in Chancery under the Act 16 & 17 Vict. c. 78, not only at their respective places of business, but anywhere within the limits of their jurisdiction.

At the request of the Council of the Incorporated Law Society (the members of which were interested in the question as commissioners appointed to administer oaths in Chancery under the Act 16 & 17 Vict. c. 78), the following point of construction and practice was submitted for the decision of the Court.

Mr. Keith Barnes, a solicitor, having occasion to make an affidavit in a cause of *Ferlotti v. Lumley*, but being unable to leave his house on account of illness, requested Mr. Coverdale, a member of the Council of the Incorporated Law Society and a London commissioner appointed to administer oaths under the Act, to call at his private residence in Upper Portland Place, and administer the oath. Mr. Coverdale attended, and administered the oath to Mr. Barnes accordingly: the jurat to the affidavit was in the following terms,—“Sworn at No. 8 Upper Portland Place, Saint Marylebone in the county of Middlesex, this 2d day of January, 1854. Before me, J. COVERDALE, a London commissioner to administer oaths in Chancery.” On this affidavit being taken to the clerk of records and writs, he refused to file it, because it was not

(a) The Lord Justice KNIGHT BRUCE was absent from indisposition.

sworn at the place of business of the commissioner. The question depended on the first and second sections of the Act (16 & 17 Vict. c. 78), which are as follow:—

“I. \*The persons now styled ‘masters extraordinary in \*724 Chancery’ shall cease to be so styled, and they and all persons hereafter appointed by the Lord Chancellor to execute like duties in England shall be designated ‘commissioners to administer oaths in Chancery in England,’ and shall possess and exercise all such powers and discharge all such duties as now appertain to the office of master extraordinary in Chancery, by virtue of any statute or order of the Court of Chancery, or of the Lord Chancellor, or usage in that behalf or otherwise.”

“II. It shall be lawful for the Lord Chancellor from time to time to appoint any persons practising as solicitors within ten miles from Lincoln’s Inn Hall at their respective places of business to administer oaths and take declarations, affirmations, and attestations of honor in Chancery, and to possess all such other powers, and discharge all such other duties as aforesaid; and such persons shall be styled ‘London Commissioners to administer oaths in Chancery;’ and they shall be entitled to charge and take a fee of one shilling and sixpence for every oath administered by them, and for every declaration, affirmation, or attestation of honor taken by them, subject to any order of the Lord Chancellor varying or annulling the same.”

*Mr. Bacon*, on behalf of the Council of the Incorporated Law Society, asked that the clerk of records and writs might be directed to receive the affidavit, notwithstanding it was not sworn at the place of business of the commissioner. Referring to the sections of the Act, he stated that it had been the constant practice of the masters extraordinary to administer oaths wherever it was found expedient within the limits of the jurisdiction assigned to them, and that they did not confine themselves to doing so at their places of business; \*and he submitted that the \*725 commissioners under the Act in question had exactly the same powers as the masters extraordinary formerly had. He further stated that the present application was made *ex parte* on an affidavit of the facts, and that the object was to obtain a settlement of the point in question.

THE LORD CHANCELLOR. — I think there is no doubt that the construction you contend for is the right one. It never could have been meant that the validity of an oath should depend upon the fact of whether it was administered at the usual place of business of the commissioner or not; and the Lord Justice TURNER has directed my attention to the seventh section of the Act, which tends to confirm this view. That section enacts that persons authorized to administer oaths for the Court of Chancery may administer oaths in the Chancery of the county palatine of Lancaster; and it is hardly possible that it could be contemplated that such oaths should be administered only at the place of business of the commissioner. The position of the words in the second section is, perhaps, rather unfortunate; the words "at their respective places of business" should follow the word "practising;" but the meaning is clear. The commissioners also could not at their respective places of business possess all the powers that were enjoyed by the masters extraordinary in Chancery, because one of those powers was the right to go to a sick man and take his oath. The affidavit therefore sworn in the present case is quite correct; and it may be taken that affidavits sworn anywhere before these commissioners within the limits of their jurisdiction are good, although they are not sworn at their own places of business. (a)

(a) June 3, 1854. *Hill v. Tollit*. This case was brought under the \* 726 notice of the Lord Chancellor on the ground that \* the decision in the above was made on an *ex parte* application.

Mr. Follett stated that the record and writ clerks had refused to receive an affidavit which had been sworn in the office of the Accountant-General before Mr. KEITH BARNES (a London commissioner). The application was now made to the Lord Chancellor at the suggestion of the Master of the Rolls, before whom it had been originally brought.

Mr. Murray, one of the clerks of the records and writs, explained that the only object which that body had in view in refusing to receive the affidavit in question, was to ascertain whether the commissioners for taking affidavits could, by the exercise of their powers in public offices, deprive the suitors' fee fund of those fees which would otherwise accrue to it.

Mr. J. H. Taylor, for the suitors' fee fund, submitted that if the words "at their respective places of business" were to be read as applicable to, and in connection with, the words "practising as solicitors," and not as pointing to the place where the oath was to be administered, it would follow that the words "at their respective places of business" were mere surplusage, and if so, it would also follow that a London commissioner might administer oaths at Liverpool or elsewhere.

The Lord Chancellor, after observing that he saw the difficulty suggested by

## \* WHITBREAD v. SMITH.

\* 727

1854. January 17. February 8, 11. Before the Lord Chancellor Lord CRANWORTH and the LORDS JUSTICES.

Real estate was settled on A. for life, remainder to his wife for life, remainder to the heirs of the body of the wife, remainder to the right heirs of A.; A. and his wife barred the wife's estate tail; and by that and other deeds it was settled to such uses as A. should appoint; A. appointed, by a deed of July, 1817, to such uses as he and his wife should jointly appoint and in default to himself for life, remainder to his wife for life, remainder to his son in fee. A. and his wife made several mortgages, all except one limiting the equity of redemption upon or consistently with the uses of the deed of 1817. In 1832 they made, under the power in the deed of 1817, another mortgage, which limited the equity of redemption to A. and his wife, "their heirs or assigns, or to such other persons, &c., as they should direct;" and by a deed of even date certain terms were assigned to attend the inheritance according to the uses of the mortgage deed of even date. The wife having died, the husband claiming to be seised in fee, sold. On a bill filed against the purchaser by parties claiming under the son to redeem, *held*, that the proviso for redemption in the deed of 1832 was not intended to vary the limitation of the equity of redemption, and did not defeat the limitation of the fee in the deed of 1817.<sup>1</sup>

A. and his wife, by deed, limited the estate to such uses as A. alone should by deed or will appoint: on the next day, A. by deed-poll appointed to such uses, &c., as he and his wife should jointly appoint, with remainder in default of appointment to the son in fee; and on the day after by a deed A. and his wife appointed the estate by way of mortgage: after this last deed had been engrossed, it was considerably altered and interlined, the wife not having been originally made a party to it: *Held*, under the circumstances, that the three deeds must be presumed to have formed but one transaction.

THIS was an appeal by the plaintiffs from the decision of the Vice-Chancellor KINDERSLEY, made on the hearing of the cause on

*Mr. J. H. Taylor*, said that he remained of the same opinion as that he had already expressed when the point was originally before him, to the effect that the words "respective places of business" must not be construed in the limited sense contended for, but must be referred to and include all commissioners whose place of business was within the radius of ten miles from Lincoln's Inn Hall prescribed by the Act, and that therefore the affidavit ought to have been received. He added that one object of the legislature, in passing this Act, namely, that of saving the expense of commissions, would be defeated if the affidavit in question were not admitted to be filed, and that although the practice was liable to abuse by a low class of solicitors, who might avail themselves of the privilege, yet that these were abuses which it was difficult to guard against, and must be met as they occurred.

<sup>1</sup> See *Heather v. O'Neil*, 2 De G. & J. 399; 6 W. R. 176; 3 Lead. Cas. in

the 11th June, 1853. The facts are here restated from the report of the case in the first volume of Mr. Drewry's Reports, page 531.

The plaintiffs in this case claimed as purchasers under a deed dated the 13th April, 1850, from W. Rees, the son of W. Rees, who died in September, 1849. The defendants, M. T. Smith and M'Donald Steele, were the devisees in trust of the will of Thomas Williams; Elizabeth Williams was his executrix, and W. H. Williams his son and beneficial devisee.

By an indenture of the 28th May, 1794, and a fine \* 728 \* then levied, certain real estate was limited to W. Rees the elder and Mary his wife, and their heirs, until the then intended marriage of their son with Anne Harris, with remainder to the said W. Rees the elder and Mary his wife, for their lives and the life of the survivor; with remainder to Warren Jane for a term of 100 years upon certain trusts which never arose; with remainder to W. Rees the younger for life; with remainder to A. Harris for life; with remainder to the heirs of the body of A. Harris by W. Rees the younger; with remainder to the right heirs of W. Rees the younger. On the 28th April, 1808, W. Rees the elder died, and on the 15th May, 1813, Mary Rees died.

By indenture of the 2d June, 1815, and a recovery then suffered, the estate tail of A. Harris (then Rees) was barred, and the estate was limited to Baker and Price for a term of 1000 years, upon trust to raise 500*l.*, with remainder to W. Rees for life; with remainder to Anne his wife for life; with remainder to Baker and Price and their heirs, during their lives, &c., as trustees to preserve, &c.; with remainder to Gardner and Baker, for a term of 1000 years, to raise 600*l.* for the children of W. Rees by Anne, with remainder to the right heirs of the survivor of W. and A. Rees; and this indenture contained a reservation of powers of revocation and new appointment in Rees and his wife.

On 27th March, 1815, Baker and Price, as trustees of the first term of 1000 years, mortgaged to one Howell to secure 400*l.*

By indenture of 30th June, 1817, Rees and his wife revoked the uses in the deed of the 2d January, 1815, save as to the first term of 1000 years, and the estate was thereby limited subject to

Eq. [838] *et seq.*, and notes to case of Earl of Huntingdon v. Countess-Dowager of Huntingdon; Lancaster v. Evors, 10 Beav. 154, 266; Wood v. Wood, 7 Beav. 183; Hipkin v. Wilson, 3 De G. & Sm. 738; Atkinson v. Smith, 3 De G. & J. 186.

the said term to such uses, \* &c., as W. Rees alone should by \* 729 deed or will appoint. On the next day, 1st July, 1817, W.

Rees by deed-poll appointed the estate to such uses, &c., as he and his wife should jointly appoint, and in default of appointment to himself for life, with remainder to his wife for life; with remainder to his son W. Rees in fee charged with 600*l*. On the 2d July, 1817, W. Rees and his wife appointed the estate to Matthews by way of mortgage for a term of 700 years to secure 250*l*., and provision was thereby made for cesser of the term on repayment of the money.

On the 27th August, 1817, Howell's mortgage was assigned to one Richards, and W. Rees and his wife appointed the estate to him by way of further mortgage for a term of 800 years to secure in all 600*l*.; this deed also provided for cesser of the term on repayment being made.

On the 10th July, 1818, Matthews assigned his mortgage to Waters. On the 29th July, 1818, Richards and Waters assigned their mortgage to Jenkins, and W. Rees and his wife appointed the estate to him to secure altogether 1000*l*.; the proviso for reconveyance was "unto such persons for such estates and in such manner as the said W. Rees and Anne his wife should appoint, and in default of appointment to attend the inheritance." On the 22d September, 1820, Jenkins' mortgage was assigned to Morgan, and W. Rees and his wife appointed the estate to Morgan, in fee to secure in addition 140*l*.; the proviso for reconveyance in this deed was "to W. Rees and Anne his wife, their heirs or assigns, or to the use of such person or persons for such estate or estates, &c., as they should jointly appoint, &c., and in default thereof to such uses as were limited by the deed-poll of 1st July, 1817."

\* On the 4th March, 1824, Rees and his wife appointed \* 730 the estate by way of mortgage to Mostyn, with a proviso for reconveyance unto and to the use of W. Rees and Anne his wife, their heirs, appointees, and assigns, or as he or they should direct.

On the 23d November, 1826, Morgan and Mostyn's mortgages were assigned to Anne Phillips, and Rees and his wife further charged the estates, making 1350*l*. the total then due; this deed provided for reconveyance unto "W. Rees and Anne his wife, to, for, and upon such uses, and subject to such power of appointment and other powers as are declared of and concerning the same by the



deed-poll of 1st July, 1817." On the 23d November, 1826, the estate was further mortgaged by Rees and his wife to Protheroe and Phillips, to secure 150*l.* 17*s.* 6*d.*; this deed provided for reconveyance unto the said W. Rees and Anne his wife, upon the uses and trusts declared by the said deed-poll of the 1st July, 1817.

On the 7th May, 1832, the premises were appointed in fee by Rees and his wife to Walker Gray, to secure (including A. Phillips and Protheroe and Phillips' mortgages thereby assigned) 1450*l.*; and it was thereby provided that on repayment of the mortgage money the estate should be reconveyed "unto and to the use of the said W. Rees and Anne his wife, their heirs or assigns, or unto such other person or persons, &c., as they should direct." And a power of sale was thereby given to Gray, the surplus purchase-money being made payable to W. Rees and Anne his wife, their heirs, executors, administrators, and assigns, or as they should direct. On the following day a further charge of 150*l.* in favour of Gray was created by Rees and his wife.

\* 731 \* Anne Rees died on the 6th September, 1841.

On the 19th July, 1842, W. Rees further mortgaged the estate in fee to Martin, to secure (including Gray's mortgage thereby assigned) 1800*l.*; this deed provided for reconveyance "unto and to the use of the said W. Rees, his heirs or assigns, or as he or they should direct." Martin, on the 22d of February, 1843, assigned to Colvin; and on the 5th November, 1845, Rees and Colvin, in pursuance of the contract for sale, conveyed for 1900*l.*, out of which Colvin's mortgage was paid off to Mr. Williams, the testator of the defendants Smith and Steele. W. Rees died in September, 1849, leaving his son W. Rees the younger surviving, who, conceiving that he was entitled under the deed of 1817, conveyed to a trustee for the plaintiffs; and the bill was filed by them to redeem as against the representatives of Williams, treating the conveyance of 1845 as merely a security for the mortgage money charged on the estate.

A statement of account between Rees the vendor and Williams the purchaser, with reference to the purchase-money agreed to be paid, was set out in the bill, and admitted to be correct in the answer; and with respect to one item of 145*l.*, part of such purchase-money, there appeared the following explanatory entry: "By abatement of purchase-money as agreed, it having been discovered after the signing of the contract that there had been a settlement

of the estate, and that it was probable, if not certain, that Mr. Rees had only a life-interest in the property, — 1451.”

The Vice-Chancellor having dismissed the bill with costs, the plaintiffs now appealed, and the cause came on to be reheard before the Lord Chancellor and the Lords Justices.

\* *Mr. Glasse* and *Mr. Whitbread*, for the plaintiffs, in \* 782 support of the appeal. — The Vice-Chancellor has miscarried in holding that the parties to the mortgage-deed of 1832 intended thereby to alter the devolution of the property to other uses than those to which it stood limited previously to the execution of that deed. It is clearly established that the mere form of reservation of the equity of redemption is not of itself sufficient to alter the previous title; the rule in mortgage transactions being that the equity of redemption remains subject to the old uses, unless there is a clear manifestation of intention to do something more than to make a mere mortgage. *Ruscombe v. Hare*, (a) *Wood v. Wood*, (b) *Hipkin v. Wilson*, (c) *Plowden v. Hyde*, (d) *Clark v. Burgh*. (e) The main authority on which the Vice-Chancellor relied was that of *Anson v. Lee*, (g) but the soundness of that decision has been seriously impugned. Lord St. LEONARDS says, with reference to it: “It seems difficult to maintain the decision, and it does not appear to be supported by the authorities.” (h) In the case of *Jackson v. Innes*, (i) the ground of the decision was that it was not merely a mortgage, but that there was apparent, on the face of the deed, a declaration of intention to make a new settlement; but even in that case, when it originally came before Lord ELDON in the Court of Chancery, (k) he thought that there was not a sufficient manifestation of intention to control the legal presumption. The Vice-Chancellor also relied on the authority of *Barnett v. Wilson*, (l) though that case is clearly distinguishable.

\* *Mr. T. Edwards* (*amicus curiæ*) referred to the report, \* 783 in the 17th volume of the Jurist, p. 331, of *Eddleston v. Collins*. (m)

(a) 6 Dow, 1.

(b) 7 Beav. 183.

(c) 3 De G. & Sm. 738.

(d) 2 De G., M. & G. 684.

(e) 2 Coll. 221.

(g) 4 Sim. 364.

(h) 1 Sugd. Powers, 364, ed. 6.

(i) 1 Bli. 104.

(k) 16 Ves. 356.

(l) 2 Y. & C. C. C. 407.

(m) 3 De G., M. & G. 1.

*Mr. Campbell* and *Mr. R. R. Hawkins*, in support of the Vice-Chancellor's judgment. — It must be assumed that *W. Rees* and his wife, the mortgagors, had read and understood the purport and effect of the several deeds which they executed, and which, upon this record, must be so interpreted. *Barnett v. Wilson.* (a) By the deed of the 30th of June, 1817, the estate was limited to such uses as *W. Rees* alone should by deed or will appoint; but by the deed-poll of the 1st of July, 1817, *W. Rees* altered the limitation and appointed the estate to such uses as *W. Rees* and his wife should jointly appoint, and in default of appointment to the son in fee.

[LORD JUSTICE KNIGHT BRUCE. — According to your statement, all the intermediate conveyances were purely voluntary, and the defendants are the representatives of a purchaser for value. How can the plaintiffs set up a claim against them?]

We submit that they cannot; and the fact that the deed of the 1st of July, 1817, was voluntary, forms one ground of the defence as pleaded in the answer. The plaintiffs have no equity to impeach the deed of June, 1817, for the son was not in the position of the wife in the case of *Ruscombe v. Hare*; (b) nor in that of the son in *Hipkin v. Wilson*; (c) he was in no better position than the heir in *Anson v. Lee*; (d) and although that authority has undoubtedly been observed upon by Lord St. LEONARDS, yet it has never been distinctly overruled; it certainly is not obnoxious to the charge of \* establishing a new rule. *Fauconberge v. Fitzgerald*, (e) *Broad v. Broad*, (g) *Jackson v. Innes*, (h) *Rowell v. Walley*, (i) *Reeve v. Hicks*. (k) Assuming, however, for a moment, that the three deeds of June and July, 1817, formed but one transaction, still we submit that there was such a clear manifestation of intention to make a new settlement by the deed of 1832, as to bring this case within the authority of *Jackson v. Innes*. (h) Here, that intention was plainly manifested by the fact, that under the deed of further charge of 1842, the

(a) 2 Y. &amp; C. C. C. 407.

(c) 3 De G. &amp; S. 738.

(b) 6 Dow, 1.

(d) 4 Sim. 364.

(e) Fitzgibbon, 207; S. C., 6 Bro. P. C. 295, Tom. ed.

(g) 2 Ch. Ca. 98.

(i) Rep. in Ch. 116.

(h) 1 Bli. 104.

(k) 2 S. &amp; S. 403.

wife did not join, as in execution of the joint power in the deed of 1817, which, if then in force, she would have done; it is also to be observed that the ultimate reversion under the deed of 1832 is the same as that under the settlement in 1815; and that, although in the transaction of 1832 both the mortgagors and the mortgagee and their legal advisers must have had before them the abstract of title under the previous instruments, yet that, notwithstanding this, the limitation of the fee was deliberately altered.

*Mr. Glasse*, in reply. — It is clear that the deed of the 1st of July was not voluntary; the three deeds were in fact executed on the same day, and the wife refusing to execute the first or third unless her rights were secured under the second, the inference that they formed but one transaction is irresistible. *Ford v. Stuart.* (a)

[The Lord Justice KNIGHT BRUCE referred to the statement of account set forth in the bill, and admitted in the answer, from which it appeared that Williams had bought the estate with a doubt that W. Rees had only a life interest in the property, and asked how, under such \* circumstances, the represent- \* 735 atives of Williams could claim the fee as purchasers for value.]

THE LORD CHANCELLOR. — The plaintiffs in this suit have filed their bill for the redemption of a mortgage in fee of an estate called the New Inn Estate. The Vice-Chancellor KINDERSLEY thought that no title to redeem was made out, and the bill was accordingly dismissed. We are of opinion that the view taken by the Vice-Chancellor is not that which we feel ourselves called upon to take. Arriving as we do at a different conclusion, we should probably, in deference to that learned Judge, have taken time before pronouncing our judgment, but that we have had an opportunity of fully considering the matter during the argument.

The estate was settled, in 1815, subject to a term, on W. Rees for life, with remainder to Anne his wife for life, with remainder, subject to a term for raising portions, to the right heirs of the survivor of William and Anne Rees, and this settlement contained

a reservation of a joint power of revocation in the husband and wife. In 1817 the joint power was exercised, and certain mortgages were executed by William and Anne Rees, who went on from time to time increasing the amount borrowed by driblets up to and until the mortgage of 1826. It was not contended that up to that time the limitation of the equity of redemption was altered. But in 1832 the mortgage-deed was executed whereby the limitation of the equity of redemption was altered; and it was argued that although up to that time the devolution of the fee would not have been different, yet that it was altered by that deed.

The husband W. Rees, having survived his wife, the defendants claim under him, whereas the plaintiffs claim \* 736 \* under W. Rees the son. It may be said, How can the claim of the latter be supported, for the ultimate trust in the settlement of 1815 was not to the son *nominatim*, but to the heir of the survivor of William and Anne Rees. The settlement of 1815 was put an end to by the deed of the 30th June, 1817; by that deed the husband and wife concurred in resettling the property to such uses as the husband alone should appoint; this made him absolute owner; but on the next day that state of circumstances was altered, for, by the deed-poll of the 1st July, 1817, the husband appointed the estate to such uses as he and his wife should jointly appoint, and in default of appointment to himself for life, with remainder to his wife for life, with remainder, not as under the settlement of 1815, to the heir of the survivor, but to his son William Rees in fee, charged with 600*l*. In the events which have happened, that limitation is the same in effect as that under the deed of 1815.

It was under and subject to the settlement of the 1st July, 1817, that the mortgage of 1832 took place. The Vice-Chancellor thought that the provision in that mortgage-deed altered the destination of the equity of redemption; and the grounds on which he proceeded were, that the proviso for redemption was not couched in the same language as in the previous mortgage-deeds, but in such words as forced him to the conclusion that there was a different intention with reference to the destination of the fee: in that respect we are unable to concur with him. The proviso for redemption is, that on repayment of the mortgage money the estate should be reconveyed "unto and to the use of the said W. Rees and Anne his wife, their heirs or assigns, or unto such other

person or persons, &c., as they should direct:" that is not the course of descent which the estate would have taken if there had \* been no such proviso. With all deference to the Vice-Chancellor, I cannot arrive at the conclusion that the form of the proviso indicates any intention of altering the limitation of the estate which had previously existed.

The rule of law, on which we are quite agreed with the Vice-Chancellor, is, as stated by him in his judgment in this case, (a) "that if husband and wife concur in mortgaging the wife's estate, or an estate in which she has any interest, whether it be a right of dower or an interest in remainder or otherwise, *primâ facie* in the absence of evidence to the contrary the wife is considered as having joined merely to secure the mortgage, and the terms on which the equity of redemption is limited will not affect her right," . . . and "that it is equally well established that if there is sufficient indication of an intention to vary the limitation of the equity of redemption, that intention will be carried out." But when a mortgage is executed, the intention *primâ facie* is, that it is a mortgage, and a mortgage only; and it is not on slight expressions in the proviso for redemption that this Court will infer any contrary intention.<sup>1</sup> Where there has been a different construction there have been special circumstances, independently of the proviso for redemption, to take it out of the rule; and that is proved by the case of *Jackson v. Innes*, (b) which is one of those cases where, on appeal, Lord ELDON altered his own decision in the Court below. When that case came before the House of Lords, Lord REDESDALE pointed out that the mortgage was one for a term of years, and when discharged, the term being at an end, the operation of the deed, so far as it declared the limitation of the estate subject to the term, remained perfectly distinct. Lord ELDON, in the Court below, had held that the course of descent was not altered; he \* admitted, however, in the \* 738 House of Lords, that he had not rightly apprehended the

(a) 1 Drew. 531, see p. 544.

(b) 1 Bli. 104.

<sup>1</sup> See 3 Lead. Cas. in Eq. (3d Am. ed.) [838] *et seq.*, and notes to *Earl of Huntingdon v. Countess-Dowager of Huntingdon*; *Lancaster v. Evors*, 10 Beav. 154, 266; *Hawley v. Bradford*, 9 Paige, 200; *Fitch v. Cotheal*, 2 Sandf. Ch. 29; *Ayres v. Husted*, 15 Conn. 504; *Johns v. Reardon*, 11 Md. 465; *Knight v. Whitehead*, 26 Miss. 245; *Weeks v. Haas*, 3 W. & S. 520; *Niemcewicz v. Ghan*, 3 Paige, 614.

case when it was originally before him ; and upon that occasion Lord REDESDALE explained that the operation of the deed as to the mortgage term and the operation of the deed as to the limitation of the fee were wholly distinct, and did not in any way depend on each other : he observed that the question did not arise upon the interpretation of the proviso for redemption, but inasmuch as the reversion dependent upon the term was expressly limited to the right heir of the survivor of the husband and wife, he thought that though the mere form of the proviso for redemption alone would not have altered the course of descent, yet that, the reversion being limited to different parties, the rules which had been established in cases of resulting trusts did not apply, and that it would be a strange presumption to infer that the right to redeem should be in another course. *Expressum facit cessare tacitum.*

The case of *Reeves v. Hicks*, (a) and many other authorities, in which a similar intention has been inferred, rest on the same clear principle. The question to be decided upon each case is more one of fact than of law ; for in each it is to be discovered whether or not there is a sufficient indication of an intention to vary the previously existing limitations.<sup>1</sup> The decision in the case of *Plowden v. Hyde* (b) appears, though it is not exactly in point, to have been governed by the same principle. But I am unable to find any thing in this transaction from which I can infer that these parties intended to alter the course of descent. It is absurd to suppose that in borrowing the small sums of money in dribblets, as they did, they ever for a moment contemplated a change  
 \* 739 in the ultimate destination of the \* property. In my opinion they meant nothing more than that there should be a power of redemption in those persons who would have been lawfully entitled to redeem.

Another point was made in this case, which for some time made an impression on my mind ; I allude to the point suggested by the Lord Justice KNIGHT BRUCE. The suggestion was, that the settlement of the 1st July, 1817, might not have been made for valuable consideration ; that by the deed of the 30th June, 1817, W. Rees had become the absolute owner of the estate, and that the deed of the 1st July was voluntary, and therefore void as against the defendants claiming as purchasers for value ; that would have

(a) 2 S. &amp; S. 403.

(b) 2 De G., M. &amp; G. 684.

<sup>1</sup> See *Heather v. O'Neil*, 2 De G. & J. 399, 409.

been a fatal objection if established, but in my opinion it is clear to demonstration on the face of the three deeds of June and July, 1817, that W. Rees the son was not a volunteer, but was a purchaser for value. Although *prima facie* he was a volunteer, yet when the three deeds are strictly looked at it is manifest that they formed but one transaction; that although, for *punctum temporis*, W. Rees the father might appear to have been the absolute owner, yet that Anne Rees the mother, who before the deed of the 30th June, 1817, had a joint power of revocation with him, refused to concur in raising more money upon any other term than that the estate should be resettled in conformity with her wishes upon her son. How is that made out? The effect of the deed of the 30th June, 1817, was to vest the estate in the husband in fee. The very next day he resettled it by appointment to such uses as he and his wife should jointly appoint, and in default of appointment the ultimate remainder was to the son in fee; and on the day after, namely, on the 2d July, the husband and wife executed their joint power by mortgaging the estate for a term of years.

There is also this peculiarity \* in looking at these deeds, — \* 740 that the mortgage-deed of the 2d July is altered and interlined in many more respects than is ordinarily the case in such instruments; if it had been in conformity with the first deed of the 30th June none of these alterations and interlineations would have appeared, and although there are these alterations in the deed of 2d July there is no alteration in that of the 30th June. It is also to be observed that the intermediate deed of the 1st July, whereby W. Rees resettled the estate giving a joint power of appointment to himself and his wife is hurriedly prepared, and is executed on a mere piece of paper. The wife may very naturally have said to her husband, "I will not assist you in borrowing money unless you consent to make a provision for our son." The deeds of the 30th June and 2d July being both already engrossed, it would have been expensive to have had new deeds; the parties accordingly had recourse to the expedient of framing the intermediate deed on the piece of paper which they got duly stamped, and then they altered the deed of the 2d July as they desired. That being so, I come to the irresistible conclusion that these three deeds formed all one transaction. I do not know whether I should not have come to the same conclusion even if these facts did not appear, but under the circumstances and for the reasons



I have already stated, I am clearly of opinion that W. Rees the son was not a volunteer, and therefore that the bill ought not to have been dismissed. The defendants must pay so much of the costs as has been occasioned by their disputing the title to redeem.

The Lords Justices concurred, the Lord Justice KNIGHT BRUCE observing with reference to the case of *Barnett v. Wilson*, (a) that whether that case had been correctly or incorrectly decided it was perfectly consistent \* 741 with the decision pronounced on the present appeal.

February 11.

The registrar having prepared the minutes of the order as in a common redemption suit where the mortgagee has been in possession, the cause was at the instance of the defendants directed to be set down to be spoken to upon the minutes.

It was then contended, upon behalf of the defendants, that as their testator (Williams) had become, under the conveyance of 1845, the purchaser of at least the life-estate of William Rees, they were not during the existence of that estate liable to account as mortgagees in possession. And it was so decided by their Lordships.

Tenant for life with an absolute power of appointment, bound to keep down the interest on charges created by himself.

It was further contended on behalf of the defendants, that the life-estates of William Rees and Anne his wife, being preceded by an absolute power of appointment, by the exercise of which they might have made the estate their own and defeated the remainderman, they were not to be treated as mere tenants for life; but that any interest which had fallen into arrear during their joint lives, and had been paid off by Williams, ought to be allowed to be a charge upon the inheritance, on the same principle that an adult tenant in tail is not bound to keep down the interest because he can make the estate his own and "the remainderman is at his mercy." (b) They submitted that the decree in this respect

(a) 2 Y. & C. C. C. 407.

(b) See *Burges v. Mawbey*, T. & R. 167; pp. 175 and 176.

should be similar to that in *Ruscombe v. Hare*, (a) but their Lordships held that William Rees was a mere tenant for life, and therefore bound to keep down the interest, and that the arrears paid by Williams could not be charged upon the inheritance.<sup>1</sup>

In the Matter of TRINITY COLLEGE, CAMBRIDGE. \* 742

*Ex parte* the REVEREND JOSHUA EDLESTON.

1854. February 18, 19. March 4. Before the Lord Chancellor Lord CRANWORTH.

The *regius* professorships of divinity, Greek, and Hebrew were founded and endowed in the University of Cambridge by King Henry VIII. antecedently to the foundation of Trinity College, and the lands on which the endowment was charged were afterwards granted to the college, which thenceforward became bound to pay the stipends of the three professors. By the 41st of the statutes granted by Elizabeth to the college, it was provided that any fellow of Trinity College, on being elected to any one of the professorships, "*Socii nomen solum teneat*." By letters-patent of Charles II., this disabling provision was annulled, so far at least as related to the Greek and Hebrew professorships. By the Act 8 & 4 Vict. c. 118, the canonry of Ely was annexed to the *regius* professorship of Greek; and in 1844, her Majesty, by letters-patent and at the instance of Trinity College, granted a new code of statutes to the college, which, after reciting the statutes given to the college by Elizabeth, but not adverting by name to the letters-patent of Charles II., revoked "all statutes, ordinances, and decrees made and given for the government of the college;" and among the new statutes the 41st of Eliz. was re-enacted in the same terms. In 1853, one of the junior fellows of the college accepted the office of *regius* professor of Greek, and was subsequently elected a senior fellow: *Held*, that, by the acceptance of the office of *regius* professor, he ceased to be a fellow, except in name only, and that his election as a senior fellow was void.

THIS case came before the Lord Chancellor; acting on behalf of her Majesty as visitor of Trinity College, in the University of Cambridge, upon the petition of the Rev. Joshua Edleston, one of the junior fellows of the college.

The petition stated that the college was founded and incorpo-

(a) 2 Bli. N. S. 192.

<sup>1</sup> See *Kensington v. Bouverie*, 7 De G., M. & G. 134.

rated by King Henry the Eighth, by the name of "The Master, Fellows, and Scholars of the College of the Holy and undivided Trinity, within the Town and University of Cambridge, of King Henry the Eighth's foundation," by his letters-patent, bearing date at Westminster, the 19th day of December, in the thirty-eighth year of his reign; that her Majesty the Queen was visitor

\* 743 \* of the college; that Queen Elizabeth, in the second year of her reign, gave to the college a body of statutes for the government of the same; that the first chapter of such statutes (which specified the members of the college) contained the following passage: "Sint tres publici Lectores pro Theologiâ, Linguâ Hebraicâ, et Græcâ, qui in publicis Scholis Academiæ legant;" that the 41st chapter of the statutes (which was entitled "De officio trium Lectorum publicorum, qui in Scholis Academiæ prælegunt, quorum unus Theologiam, alter linguam Hebraicam, tertius Græcam docet") prescribed the duties of the said professors, the mode of their election and admittance, and contained the following passage: "Quod si Socius Collegii Sanctæ et Individuæ Trinitatis prædicti ad aliquem locum prædictorum Lectorum electus sit, cum primum admissus fuerit, deinceps Socii nomen solum teneat, et si unus sit ex numero Octo Seniorum senioritatem illam quoque cubiculum suum et Sisatorem habeat; com-  
meatu vero stipendio et liberatura socio debitis toto illo tempore quo illud legendi munus obit penitus careat. Cæterum si legendi munus deposuerit tum sodalitiū ut antea cum omnibus commoditatibus habeat."

The petition stated that divers of the sovereigns of this realm had, at the request of the college, from time to time issued their royal letters-patent, directing certain changes in the said statutes of Queen Elizabeth; and that his Majesty King Charles the Second issued his letters-patent, dated the 8th day of April, in the thirteenth year of his reign, which after reciting the fact that the stipends of the professors, though formerly ample, were then, having regard to the change in the value of money, insufficient, proceeded: "Nos igitur hominum Academicorum præsertim publicorum in Academiâ professorum commodis prospicere

\* 744 cupientes ex \* supremâ nostrâ regiâ potestate certâ scientiâ et mero motu dictas clausulas seu sententias superius a nobis recensitas annullamus et cassamus in quantum concernunt præscriptum illum numerum lectionum et sodalitiî amissionem.

Et quo æquior sit inter mercedem et laborem proportio statuimus quod Socius dicti nostri Collegii si electus sit ad locum Lectorum Linguae Hebraicæ vel Græcæ (nam Theologiæ Professore excipimus propter annexum satis opimum Sacerdotium) non tenebitur ex hoc tempore sodalitium suum deponere sed eo gaudebit cum omnibus suis emolumentis et nominatim Isaaco Barrow Linguae Græcæ Lectori publico jam constituto licebit Socii locum tenere eoque cum omnibus suis privilegiis et emolumentis gaudere et frui."

The petition then stated that, by the Act 3 & 4 Vict. c. 113, § 12, a canonry in the Cathedral Church of Ely was, from and after the same should become vacant, permanently annexed to the *regius* professorship of Greek in the said university; and the said canonry falling vacant in or about the month of November, 1849, the Rev. James Scholefield, M.A., then *regius* Professor of Greek in the said University, was then, or shortly afterwards, instituted to the said canonry, which was about the annual value of 600*l*.

The petition then stated that her Majesty Queen Victoria was graciously pleased to give a new code of statutes to the said college by her royal letters-patent, bearing date at Westminster, the 24th February, in the seventh year of her reign, and which, after reciting the statutes given to the said college by Queen Elizabeth, and that the master, fellows, and scholars of the college had, by their petition, under the common seal of the college, to her present Majesty humbly represented that they were of opinion that several of the \* statutes as then existing were impossible or \* 745 hurtful to be observed, or otherwise needed some change, in order to the securing of the good administration of the college; and that they had given their best care and attention to a revision of the said statutes, omitting and taking out of the same those things which seemed to be inconvenient to be observed, and changing where need was the provisions of the statutes, in order to render the same such that, by the careful observance thereof the college might be well administered; and that they had prayed her Majesty's royal letters-patent confirming the statutes so revised and altered, and directing that, from and after the acceptance of the letters-patent, the statutes of the college so revised, altered, and confirmed, and no other, should be of force and authority in the said college, — proceeded as follows: "We, following the course taken by our royal predecessors, and being desirous to promote as much as in us lies the peace, good government, honour, and welfare of the said

college, and in order to render the statutes of the said college such that, by the careful observance thereof, the said college may hereafter be well administered, and may to the latest posterity bring forth abundant fruit of piety and sound learning, which we, no less than our said royal predecessors, earnestly desire, have thought good to send these our royal letters-patent. And we do, of our especial grace, certain knowledge, and mere motion, hereby annul, revoke, and make void all statutes, ordinances, and decrees made and given for the government of the said college and the respective members thereof before the date of these presents. And we having also taken into our royal consideration the new body of statutes so revised and altered as aforesaid, and having, by and

with the advice of our privy council, made such alterations  
 \* 746 and amendments therein as it was conceived \* would best answer the ends proposed, do approve of the said statutes so altered and amended (which statutes are contained in one book written upon vellum and bound up in leather, and entitled ‘*Liber Statutorum Collegii Sanctæ et Individuæ Trinitatis in Academiâ Cantabrigienci*,’ containing ninety-one pages, and beginning with these words, ‘*Magister Collegii unus esto*,’ and ending with the following words, ‘*in perpetuum sustententur et alantur*,’) and have signed the same at the beginning and end with our royal sign-manual. And we do hereby give, grant, ratify, confirm, and establish the said book, and do hereby direct that, from and after the entry of these our letters-patent in the said Book of Statutes, or other acceptance thereof by the master, fellows, and scholars of the said college, all and every the statutes, orders, matters, and things contained in the said book, and no other, shall be of force and authority in the said college for the future government thereof, and as rules of good manners and discipline to be observed by the members thereof respectively, whom we hereby enjoin and strictly command duly to observe the same. And our will and pleasure is, that the said Book of Statutes, and all and every the orders, matters, and things therein contained, shall be of the same force, validity, and effect as if they were fully and particularly recited, expressed, and contained in these our letters-patent.”

The petition then stated that the statutes mentioned in her Majesty’s royal letters were, very shortly after the date thereof, duly accepted by the master, fellows, and scholars of the college; that the first chapter of the last-mentioned statutes, which specified

the members of the college, mentioned the professors of divinity, Hebrew, and Greek in the same terms as were employed in that behalf in the first chapter of Queen Elizabeth's \* statutes; and that the 41st chapter of the statutes granted \* 747 by the letters-patent of her Majesty was in precisely the same terms as the 41st chapter of the statutes of Queen Elizabeth.

The petition then stated that, on the 27th April, 1853, the Rev. W. Hepworth Thompson, M. A., then one of the fellows of the college, was elected *regius* professor of Greek in the university, and on the 11th June following, was, at his own request, duly sworn in and admitted to the office of *regius* professor of Greek by the vice-master of the college, and had since been instituted to the canonry in the Cathedral Church of Ely, and that he now held the office of *regius* professor of Greek in the university and the canonry so annexed thereto.

The petition submitted that the said W. H. Thompson, upon his admission to the office of *regius* professor of Greek in the said university, ceased to be a fellow of the said college. The petition then stated that the master and seniors of the college, who, by the last-mentioned statutes, were the governing body of the college, had, however, continued to treat W. H. Thompson as an actual fellow of the college, and that he continued to receive the allowances and payments out of the college revenues to which he would be entitled if he had not been elected and admitted to the professorship; that, at the annual election of fellows in October, 1853, at which all vacant fellowships were required to be filled up, such vacant fellowships were filled up; but that W. H. Thompson's fellowship was not included in the number, there being seven fellowships vacant independently of W. H. Thompson's fellowship.

The petition then stated that the eight senior fellows \* of \* 748 the college received a double dividend, and the eight fellows next to them in seniority also received a larger amount than the ordinary dividend of the fellows below them; that, in the month of November, 1853, a vacancy occurred in the number of senior fellows of the college, and that, on the 26th of November, 1853, the masters and seniors of the college elected W. H. Thompson as a senior of the college, to supply the vacancy in the office, and that on the following day he was sworn to the said office; that, in consequence of W. H. Thompson being allowed by the master and seniors to retain his fellowship, the petitioner, who was then seven-

teenth fellow, was postponed in his succession, not only to such increased dividend, but to college livings, to which the fellows succeed according to their standing in the college, and to other advantages dependent on seniority of standing in the college.

The petition prayed a declaration that W. H. Thompson, upon his admission to the office of *regius* professor of Greek in the university, ceased to be a fellow of the college, and that his election and admission as a senior fellow of the college was irregular and void.

The affidavit of the Reverend W. H. Thompson stated that, according to his belief the letters-patent of Charles the Second were not issued at the instance or request of Trinity College; that a letter-patent accepted by the university, or if not formally accepted, which had been acted upon by the university, had the same force and validity as a statute of the university; that since the letters-patent of Charles, the 41st statute of Elizabeth had never been enforced so far as regarded the number of lectures thereby \* 749 prescribed, or the removal of a fellow \* from another college to Trinity College, in case of such last-mentioned fellow having been elected to either of the three professorships; or as regards the depriving a fellow of Trinity College of his emoluments in consequence of his election to either of the professorships of Hebrew or Greek; that he had accepted the professorship of Greek, in the belief that it would only be compulsory on him to perform the duties prescribed by the letters-patent of Charles, and that he should retain the emoluments of his fellowship, and that he therefore had resigned the office of tutor, the net emoluments of which exceeded 1200*l.* per annum.

From the affidavit of the Rev. W. Whewell, it appeared that, in 1540, King Henry the Eighth founded five public lectureships; namely, one of divinity, one of Greek, one of Hebrew, one of civil law, and one of physic, and endowed them with a perpetual stipend of 40*l.* each; that ever since they had respectively continued to lecture in the university schools, and that all members of the university had an equal right of attending the lectures; that Trinity College was founded in 1546; that in the same year King Henry the Eighth granted divers manors, lands, &c., to Trinity College, which body thereupon undertook to defray the stipends of the three *regius* professors of divinity, Greek, and Hebrew; that statutes for the government of the university were granted by Edward the

Sixth in 1549, and contained provisions respecting the lectures on theology, Greek, and Hebrew ; that statutes for the government of Trinity College, based on the preceding statutes of Edward the Sixth, were prepared about 1554, whereby it was provided that the professorships of divinity, Greek, and Hebrew should be appointed not by the Crown, but by the Vice-Chancellor and masters of the \* four principal colleges, and the two senior fellows of \* 750 Trinity College ; that Queen Elizabeth, in the first and twelfth years respectively of her reign, granted a body of statutes to the university, containing various provisions respecting the public lecturers of theology, Greek, and Hebrew, and the attendance of members of the university at their lectures ; that in the second year of her reign a body of statutes was granted to Trinity College which were accepted, and have been acted upon with certain exceptions ever since up to the year 1844 ; that the letters-patent of Charles the Second were not issued at the request of Trinity College ; that there was on the back of such letters-patent the following indorsement : “ A patent granted unto the divinity, Hebrew, and Greek lecturers in the university. — HASTINGS.” That, after the issue of the letters-patent of Charles the Second, they were acquiesced in and acted upon by all persons to whom the same referred, and that divers fellows of Trinity College had subsequently been elected and admitted to the professorships, and continued to receive the livery and stipend, and all other emoluments receivable in right of the fellowship.

The affidavit stated that, in the year 1843, the master and seniors of Trinity College prepared a draft of statutes for the government of the college, and founded on the statutes of Queen Elizabeth, and preserving the order and greater part of the provisions thereof, but embodying therein certain alterations and amendments made from time to time by letters-patent granted by the Crown at the prayer of the college, and proceeded : “ I, and the eight seniors for the time being, did not alter the 41st chapter, as contained in the statutes of Queen Elizabeth, by consolidating therewith the provisions of the letters-patent of King Charles the \* Second, because we conceived that application \* 751 for such a revised and amended statute ought not to be made to the Crown by the college alone, without the concurrence of the university, and because we considered that the consent of the university to make a joint application for such revised statute



could not be obtained without great delay ; a belief justified by the fact, that the draft of a revised body of statutes for the university, though it has been for several years under the consideration of the university, has not yet been presented to the Crown for its approbation and consent. In the draft so prepared by me and the seniors, no alteration whatever was made in the said 41st chapter of the statutes ; and it was not my intention, nor as I believe the intention of the senior fellows of the college, for the time then being, to make or to attempt to make any change whatever, in the emoluments, duties, or situation of the three public lecturers, as regulated by the 41st chapter, taken in conjunction with and modified by the letters-patent of Charles the Second ; and on the contrary it was my intention, and as I believe the intention of the eight senior fellows, for the time being, of the college (with all of whom I had frequent communications, respecting the preparation of the draft, in preparing the same in the terms which were ultimately adopted and ratified by her present Majesty), to leave entirely unchanged and without any variation whatever, all the emoluments, rights, advantages, as well as the duties secured to or imposed upon the three public lecturers by the 41st chapter as modified by the letters-patent of Charles the Second. And we did not, either in consequence of two canonries of the Cathedral Church of Ely, by the Act passed in the fourth year of her present

Majesty, intituled ' An Act to carry into effect, with certain \* 752 modifications, the report of the commissioners \* of ecclesiastical duties and revenues,' having been directed to be annexed and united to the *regius* professorships of Hebrew and Greek, or for any other reason whatever, intend to deprive any fellow of Trinity College, who might thereafter be appointed *regius* professor of Greek or Hebrew, of his right under the letters-patent of Charles the Second, to retain the emoluments and advantages of his fellowship or in any other way to alter or affect the rights or duties of the three *regius* professors of divinity, Greek, and Hebrew, or any of them ; and at the time when the draft containing the 41st chapter unaltered was agreed to by myself and the eight seniors, and at the time when the revised statutes (granted and ratified by the letters-patent of her present Majesty) were received and accepted by us, I conceived that the words '*patre nostro charissimo*,' being retained in the statute immediately after the words '*Rege Henrico Octavo*,' and the provisions of the same

statute, without the modifications introduced by the letters-patent of King Charles the Second, being in many respects burdensome, unsuitable, and even absurd if applied to the present time, it would evidently be the intention of the letters-patent of her present Majesty, not to re-enact the 41st chapter as of the present time, but to retain it merely as modified by the subsequent letters-patent of Charles the Second, which I then believed and still believe to be equivalent to a statute of the University of Cambridge, and not to be a statute or ordinance for the government of Trinity College only and therefore irrevocable, without the consent of the university. And I, and, as I believe, the seniors, retained the words '*patre nostro charissimo*' intentionally in the draft, in order to mark more strongly that the said statute was to be considered as taking effect from the time when it was originally

\* granted, and was subject to the alterations made by the \* 753 letters-patent. I believe that if all the provisions of the 41st chapter, unmodified by such letters-patent, were strictly enforced, it would not be possible to find duly qualified persons who would accept the office of *regius* professor of Greek, or Hebrew, or even divinity. I and the eight senior fellows of the college for the time being, taking into consideration the facts I have stated with respect to the grant of the body of statutes by her present Majesty, and the power conferred upon us to interpret the statutes by the 46th chapter thereof, decided, shortly after the Rev. W. H. Thompson was elected and admitted *regius* professor of Greek, that his fellowship had not thereby become vacant, and subsequently he was reckoned as entitled to the same dividend or share of the surplus revenues of the college, and all the usual emoluments and advantages of a fellow of the college, as if he had not been elected and admitted such *regius* professor."

The 41st statute of Elizabeth contained the following passage: "Hujus statuti unum exemplar sit inter statuta dicti Collegii, et alterum in libro de statutis Academiæ descriptum." The letters-patent of Charles the Second were not embodied in the statutes either of Trinity College or of the University. Dr. Ferne was the Vice-Chancellor and also Master of Trinity at the time when the letters-patent were granted; and (whether owing to that circumstance or otherwise it did not appear) the letters-patent themselves were preserved in the college treasury.

Various portions of the statutes of Elizabeth were commented

upon in the course of the argument; but as the particular passages which have most bearing on the question are cited in the \*754 judgment, it has been deemed \* unnecessary to make any further allusion to them either in the statement or argument.

*Mr. Rolt* and *Mr. Denison*, in support of the petition. — Any statute affecting to deal with the constitution of a college must be assumed to be a college statute; but we submit, that whether the letters-patent of Charles be regarded as a college statute or not, the same result will follow; in the former case *cadet quæstio*, and in the latter they must be held to be repealed, at least so far as they were binding on the college. It surely is not incompetent for one corporation, though subject jointly with another to certain rules, to make by-laws the effect of which will be binding on itself: thus, for instance, while there is nothing to prevent a member of St. John's being a fellow of Trinity, yet Trinity might make rules and by-laws which would have the effect of excluding a member of St. John's from holding the fellowship and continuing a member of St. John's. In the present instance, the respondent clearly and voluntarily accepted the office long after the passing of the Act 3 & 4 Vict. c. 113, and he cannot be heard to say that he is not bound, and that the canonry has been forced upon him. The mere fact that the recent statutes granted by her Majesty were accepted by the Master in a different sense than that which their language plainly imports cannot alter their effect.

*Mr. J. Baily* and *Mr. De Gez*, for the respondent, the Reverend W. H. Thompson. — It is clear that the professorships were university offices, involving the discharge of duties to the university at large, and open to the competition of all the colleges, and in existence previously to the foundation of Trinity College; the professors were appointed not by Trinity College alone, but \*755 by the whole university; the \* stipends for these professorships were in the first instance provided by the Crown; and though the payment was subsequently made by the college, yet it was only because the lands originally chargeable with such stipends were granted to them by the Crown. The statutes of Elizabeth, as well as the letters-patent of Charles, were clearly university statutes; a copy of the former was expressly directed to be kept

in the archives of the university, and the latter was specially indorsed as granted to the lecturers in the university; they were neither of them addressed to Trinity College alone, but to every one who was or could be interested. We submit that the letters-patent of her Majesty are only applicable to the repeal of the statutes, ordinances, and decrees for the government of the college, and it was altogether without the scope of the college's authority to deal with the letters-patent of Charles, affecting as they did university offices. The petition prays a declaration that Mr. Thompson ceased to be a fellow on his acceptance of the professorship, that certainly cannot be granted, as the 41st statute especially contemplates the resumption of the fellowship with all its emoluments on vacating the professorship; and, inasmuch as the clause as to the retention of the name only of a fellow does not expressly point at a loss of seniority, or to a forfeiture of the surplus dividends, it ought not by implication to receive such a construction.

*Mr. Malins and Mr. Birkbeck, for Trinity College.* — The canonry not having in fact been added to the professorship for a period of upwards of nine years after the passing of the Act 3 & 4 Vict. c. 118, had the incumbent of the canonry lived for ninety years, it follows, according to the construction of the petitioner, that the professorship of Greek would have had no other \* emoluments in respect of that professorship than 40*l.* a \* 756 year during the whole period of the then existing incumbency. The petitioner took his fellowship subject to those above him obtaining the *regius* professorship of Greek, and while the letters-patent of Charles were in existence, how can he under these circumstances and in this form of proceeding be heard to complain? In the 46th statute is the following clause: “Si quid ambigui in his statutis reperiatur id iudicio Magistri et majoris partis octo Seniorum semper dirimatur.” It follows, therefore, that the interpretation put on these statutes by the master and senior fellows, acting on their honest apprehension, must be assumed to be correct; nor indeed would their decision, under such circumstances, be disturbed by any visitor. *Case of Queen's College.* (a) The 41st chapter of the statutes of Elizabeth being re-enacted, only takes its place from the time of Elizabeth, and

(a) Jacob, 1; see p. 87.

leaves the letters-patent of Charles unaffected. *Shipman v. Henbest*, (a) *Williams v. Rougheedge*, (b) *Bayly v. Murin*. (c) On an analogous principle, where a will has been revoked by one codicil and re-executed by another, the latter has not the effect of repealing the revoking codicil.

*Mr. Rolt*, in reply, waived so much of the prayer of the petition as sought a declaration that the respondent ceased to be a fellow on acceptance of the professorship, and asked a declaration that in that event he ceased to be a fellow except in name only, and, as a consequence, that he should be excluded from the seniority or perception of any share in the revenues of the college. He

submitted that neither the mode of electing the professors, \* 757 nor the fact of the professors having duties \* to discharge to the university, constituted them officers of the university; and that as to the professorships being open to members of all colleges, this was common ground, though, if a fellow of another college were elected professor, the petitioner's contention would be most reasonable. He also submitted that there was no evidence whatever that the statutes of Elizabeth or Charles were entered as university statutes in the books of the university.

THE LORD CHANCELLOR. — Though this is a very important case, it lies in a narrow compass; from the time it has occupied in argument, I have been able to turn the matter over in my mind, and feel competent and warranted to deal with the question now, and I may here observe that it is a question on which I entertain no doubt whatever. It comes before me as called on to advise her Majesty on a petition presented by one of the fellows of Trinity College, praying a declaration that Mr. Thompson upon his admission to the office of *regius* professor ceased to be a fellow of the college, and that his election and admission to be senior fellow was void. Under no circumstances could the application to that extent be just; but that can be corrected by introducing the words of the 41st chapter of the statutes of Elizabeth. It is clear that, looking at the college statutes of 1844, which in terms embodied that 41st chapter, if we are to be guided by them, the petitioner is right in his contention, and that Mr. Thompson by his acceptance of the *regius* professorship became "*Socius nomine tantum*."

(a) 4 Term R. 109; see p. 114. (b) 2 Burr. 747. (c) Vent. 244.

The only question is as to whether these statutes exclusively regulate the rights of the parties. There can be no doubt but that the Crown being visitor of Trinity \* College, the \* 758 college might by surrender of its statutes or charter obtain new statutes, subject to any trust that might be engrafted on them. The college did that in 1844, and new statutes were granted. By those statutes Mr. Thompson, being elected Greek professor, would cease to be a fellow except in name only. Have those statutes that effect or not? It is said they have not, for these reasons. The origin of the professorship was in the time of Henry the Eighth, who founded five professorships at Oxford and five at Cambridge. With three only of the latter have we any thing to do; namely, the professors of Greek, Hebrew, and divinity. Certain property belonging to the Crown from the Abbey of Westminster was charged with the expense of maintaining these professorships; and afterwards the stipulation was, that Trinity College, the property having been made over to them, should pay 40*l.* a year as a stipend to each of these three professors.

So the matter stood until the reign of Elizabeth, when a new body of statutes was granted, which, subject to the exception to which I shall advert, have governed the college down to a recent period, and in those statutes was a regulation as to electing the professors, and the payment of a stipend of 40*l.* a year out of the college revenues. It was made part of that regulation, the election not being by the college, but by the master and two senior fellows, joined with the Vice-Chancellor, and three other functionaries of the university (that is, three electors in the college, and four out of the college), that if any fellow should be elected to any one of the professorships, he should cease to be a fellow: he was to retain the name only; if he ceased from any cause to be a professor, he was to be restored to his rights of fellow; if he was a senior fellow, he was to cease to be so except \* in name, retaining, however, some small advantages, — \* 759 the right of having a sizar as an attendant, and his chambers, *cubiculum*. If, then, Mr. Thompson had lived in the reign of Queen Elizabeth and not in the reign of Queen Victoria, he would have lost his fellowship and would have had his 40*l.* a year. Why is that not to be so now? for the 41st chapter of the present statutes contains the same words as that of Elizabeth, retaining even inaccuracies, such as speaking of Henry the Eighth as “our late

father," though the person speaking is her present Majesty. What is said, however, in answer is, that between the statutes of Elizabeth and those of Victoria there were granted letters-patent by Charles the Second, which altered the then existing regulations, and made certain provisions for the benefit, not of Trinity College alone, but of the whole university ; and that no statute ordained for the government of the college can affect the rights of the university. Let us see how this is. I assume it to be clear, that by the statutes of Elizabeth, Mr. Thompson would have lost his fellowship, subject to the trifling advantages already alluded to. Is that altered by the letters-patent of Charles the Second? Those letters-patent, reciting the 41st chapter of the statutes of Elizabeth, proceed to say — "Nos igitur hominum academicorum præsertim publicorum in academiâ professorum commodis prospicere cupientes ex supremâ nostrâ regiâ potestate certâ scientiâ et mero motu dictas clausulas seu sententias superius a nobis recensitas annullamus et cassamus in quantum concernunt præscriptum illum numerum lectionum et sodalitii amissionem. Et quo æquior sit inter mercedem et laborem proportio statuimus quod Socius dicti nostri collegii si electus sit ad locum Lectorum linguæ Hebraicæ vel Græcæ (nam Theologiæ professorem excipimus propter

\* 760 annexum satis opimum sacerdotium) \* non tenebitur ex hoc tempore sodalitiū suū deponere." Supposing it had stopped there, the statutes of Trinity College would undoubtedly have to be read from that time as if there were no provision in them for the loss of the fellowship.

What, however, is the meaning of that instrument, and how is it affected by the letters-patent of her present Majesty confirming the revised statutes and revoking all other statutes and ordinances of the college? *Mr. Malins* pressed on me language supposed to have fallen from Lord ELDON, in the case of Queen's College, (a) which, however, I have not been able to apply to the present case, to the effect that, in construing the statutes of a college as visitor, I must look at them in a more liberal way than if construing a statute at law or in equity. This I felt at the time I could not assent to. My duty in construing a college statute or other instrument, is to find out the meaning of the words used, and the meaning must be collected in the same manner in the one case as in

(a) Jacob, 1; see p. 37.

the other. Neither do I assent to my having a right to look to extrinsic evidence in any other way than is usually done. The intention, then, of the letters-patent of Charles was to place the professors of Hebrew and Greek in the same position as if the disabling clause in the 41st chapter had not existed. I much question if the grant of the letters-patent was any thing more than an act of that dispensing power which at that time, either rightly or wrongly, was exercised by the sovereign, and which, in the case of the universities, led to those great constitutional questions which took place. Lord ELDON alluded to this in the case of Queen's College, (a) as having been very usual, and I cannot but think that this was merely an \* exercise of royal power to \* 761 render unnecessary the compliance with the provisions of the previous statute. I do not, however, think this important, for if the Crown had made a grant, and the college had acquiesced in it for two hundred years, this would have been evidence enough to show an alteration of the original statute. What, however, is more material is, that it is said that the grant was in favour of the university, and that therefore the Crown could not alter it without the consent of the university, and that the university has never consented. I confess I cannot come to that conclusion, and I do not think that in any sense it was a statute of the university. It is a statute which the university has an interest in seeing carried into effect, but I do not understand in what possible sense it is a grant to the university.

Then, that being so, what is the effect of the new statutes of 1844? The effect seems to be clear that they in terms get rid of the dispensing statute of Charles; for after stating that the master, fellows, and scholars of the college had represented that Queen Elizabeth had given the body of statutes before mentioned or recited to the college, for the government of the same, and that divers of her Majesty's successors had in their care for the said college issued their letters-patent directing certain changes in the said statutes (that is just as if the letters-patent of Charles had been here mentioned), and the said college had been governed by the said statutes so from time to time changed and altered, it enacts, "We do of our especial grace, &c., revoke and make void all statutes, &c., made and given for the government of the said

(a) Jacob, 1; see p. 37.



college, and the respective members thereof, before the date of these presents." As far, then, as the college is concerned,

\* 762 there is to my mind \* no doubt but that the letters-patent of Charles the Second were by this means annulled. We thus come to the new statutes, embodying in terms the 41st chapter of the statutes of Elizabeth, depriving of his office the fellow who accepts the office of *regius* professor.

I asked in the course of the argument what was meant by an university statute, but got no very satisfactory answer. It was said that the rights of the university would be affected by getting rid of the letters-patent of King Charles, but I do not think so. It may well be that the new statutes in no way affect the obligation of the college to set in motion the election of the professors. In one sense the university has an interest in the statutes of Trinity College, and the Crown could not relieve the college of the duty of charging their revenues with the stipend and electing the professor. In that sense it is a statute in which the university has an interest, and if the Crown had annulled the payment of the 40*l.* or the election of the professor, the university might have come by *scire facias* to have the letters-patent repealed. But what is said is that the new regulations have not given the university so much as they would have had if the former letters-patent had remained in force, though in fact the extent to which the university has an interest in these professorships is limited to a voice in the election of the professor and the payment of his stipend; but this is no cause of complaint. It appears to me, therefore, to be a matter admitting of no doubt, that the letters-patent of Charles the Second were revoked by the letters-patent of Victoria, and that the matter must be treated as if there were no such instrument as the former in existence.

What, then, is the consequence? The petition, as I \* 763 \* have already observed, is wrong, in so far as it prays that

Mr. Thompson on his admission to the professorship ceased to be a fellow; he must remain a fellow though in name only, and must have such benefits as are granted by the statutes of her present Majesty. But it is said that, though he is removed to this extent from being a fellow, he is still entitled to seniority and entitled to a share of the surplus dividends. I think neither of these propositions tenable. It was argued that he is not eligible to seniority, because seniority is an office; that may or may not be a

valid argument, but what seems to me to be stronger is the language of the 11th chapter of the existing statutes, which says, "Statuimus porro et decernimus, ut Seniorum electio intra novem dies ad summum post locum vacantem fiat: sitque ista horum eligendorum forma. Cum Senioris alicujus vacet locus Magister vel eo absente Vice-magister convocatis in sacello, ut dictum est, illis Senioribus qui reliqui sunt, cooptet in eum cœtum Socium illum qui sit proxime senior," &c. I cannot think that any one *Socius nomine tantum* is eligible into the seniority, and it is equally clear that he is not entitled to share in the dividends. I think it would be so even if there were not the expressions, to which I will now refer, at the end of the 33d chapter: "Pecunia autem quæ supersit ex consensu Magistri et majoris partis octo Seniorum inter Magistrum, Socios, et Sacellanos pro rata cujusque portione juxta consuetudinem usu jamdiu receptam distribuatur." It is thus the *Magister*, *Socii*, and *Sacellani* who are to share; but Mr. Thompson cannot be in this sense a *Socius*, for then he would not be a *Socius nomine tantum*. By this express clause he is excluded, even if on a more general view of the matter he was not, from the benefits of the fellowship, and among them seniority, and any share of the surplus dividends.

\* I arrive at this conclusion with as little doubt as I ever \* 764 felt on any subject, though with some reluctance, as it may be at variance with the interests of learning and literature, and with what was the intention of the college. I have, however, only one straightforward course to follow.

One matter remains, that of costs, on which it appears to me I ought to do as Lord ELDON did in the case of Queen's College (a) and other similar cases before him. I think it was right that this question should have been brought here, and the costs of all parties will therefore be borne by the college.

(a) Jacob, 1.

[ 595 ]

DAWSON *v.* JAY,

AND

*In re* MARY JAY DAWSON, an Infant.

1854. April 1, 3. Before the Lord Chancellor Lord CRANWORTH.

Although the Court will under special circumstances allow an infant ward to go out of the jurisdiction,<sup>1</sup> yet it will not compel the removal of an infant ward out of the jurisdiction.

An infant, being a British subject and also an American citizen and having lost both father and mother, was brought over to England from the United States, where her property was situated, by a paternal aunt with whom she resided: an application was then made by a maternal aunt, who had been appointed her guardian by the Court in America, to have the custody of the infant delivered to her with the view of taking the infant back to America. The Lord Chancellor refused to interfere, being of opinion that he had no right to make such an order, even if on other grounds he had thought proper to accede to the application.<sup>2</sup>

THIS was an application on behalf of Mary Jay Dawson, an infant of the age of eleven years, suing by W. MacDonald, her uncle and next friend, to discharge a certificate made in the cause and matter by the chief clerk of Vice-Chancellor STUART, which had been approved by his Honor, the effect of which was to

\* 765 direct Miss \* Mary Ann Dawson, one of the paternal aunts of the infant, and with whom the infant was living in this country, to deliver up the custody of the infant to Miss Elizabeth Clarkson Jay, one of the maternal aunts of the infant, who intended to take the infant to reside with her in the United States. The following statement will explain how the question at issue arose.

The infant, M. J. Dawson, was the daughter and only surviving child of William Dawson, late of the city of New York, and of Sarah Dawson, both deceased. W. Dawson was born in England, but went at a very early age to reside in the United States, and in 1824 he took the necessary steps and became a naturalized citizen: in 1825 he established himself in business in the city of New

<sup>1</sup> 3 Lead. Cas. in Eq. (3d Am. ed.) 538, 586 *et seq.*, in notes to *Eyre v. Countess of Shaftsbury*; *Hart v. Tribe*, 19 Beav. 149.

<sup>2</sup> See *Hope v. Hope*, 4 De G., M. & G. 328, 346.

York, and subsequently married there Sarah Dawson, an American lady possessed of considerable property; he continued to reside in New York down to the time of his death. The infant was born in New York, in November, 1842; S. Dawson died in 1846; and W. Dawson died in March, 1852, intestate.

At the time of his death, W. Dawson had two sisters, namely, Miss Mary Ann Dawson and Miss E. G. Dawson, who resided with him; he had also a brother, Mr. Frederick Dawson, settled at Baltimore in Maryland, and another brother, Mr. Robert Lee Dawson, living in England; these individuals, together with L. MacDonald (another sister of W. Dawson) the wife of W. MacDonald (the next friend), and Mr. Pudsey Dawson, a cousin of the infant, both of whom were resident in England, were the nearest relations of the infant on the paternal side. On the maternal side, the infant had several uncles and aunts, all resident in New York or the neighbourhood, and persons of great wealth and respectability; Miss Jay was one of those aunts. The \* infant, as \* 766 heiress of her mother, was entitled to considerable property wholly situate in the city of New York, consisting of freehold land and of a sum of money (7000 dollars) invested on mortgage at seven per cent. W. Dawson left only personal estate, and to a small amount. The education and bringing up of the infant had since her mother's death been entirely under the management and superintendence of her two paternal aunts, Miss E. G. Dawson and Miss M. A. Dawson, who from that time had resided with her father. It appeared that according to the laws of the State of New York, the infant, if of full age, would have been entitled on the death of her father to claim the administration of his estate, and that by the same laws the guardian of an infant was entitled to claim the administration of all estates of which the infant, if of full age, would have been entitled to claim administration, and further that, at the request of such guardian, any other person might be joined in the administration.

On the 14th June, 1852, Mr. R. L. Dawson, having come to New York, applied, with the concurrence of Mr. F. Dawson, to the surrogate of the city and county of New York to be appointed guardian of the person and estate of his niece. This application was opposed by Miss Jay, who, together with the other maternal relatives, was very anxious that the infant should not be removed from New York for her education during her minority; and the

surrogate in consequence refused the application. A good deal of negotiation then took place between the members of the two families, which terminated in an arrangement under which Miss M. A. Dawson was, on the 21st June, 1852, with the concurrence of Miss Jay and the other maternal relatives, appointed guardian of the infant; and subsequently Mr. R. L. Dawson was \* 767 appointed jointly with her administrator of \* the estate of W. Dawson. The concurrence of the maternal relatives was given in consequence of an engagement entered into by Miss M. A. Dawson, which was reduced into writing, and was in the following terms: "New York, June 30, 1852.—So long as I am guardian to Mary Jay Dawson, whether till she is fourteen or afterwards if she elect me as her guardian at that age till she is twenty-one, I promise to bring her up in the United States, teaching her to consider it as her home, paying only an occasional visit to England. MARY ANN DAWSON."

In the beginning of July, 1852, Mr. R. L. Dawson and Miss M. A. Dawson left New York, taking the infant with them, and went to Baltimore, on a visit to Mr. F. Dawson. They there found that, on the 10th June, 1852, Mr. F. Dawson had obtained himself to be appointed by the Orphans' Court of Maryland, guardian of the infant. Upon learning this, Miss M. A. Dawson immediately wrote a letter to Miss Jay, informing her of what had taken place, and stating that, under these circumstances, the engagement entered into by her, Miss M. A. Dawson, could not be carried out, the guardianship of the infant no longer belonging to her.

On the 4th August, 1852, Miss M. A. Dawson returned with her niece to New York; and on the 6th August, 1852, Miss Jay instituted a suit in the Supreme Court of the State of New York to obtain the removal of Miss M. A. Dawson from the guardianship, and the appointment of herself to be guardian instead. In this suit an injunction was at once obtained, restraining Miss M. A. Dawson, and also Mr. R. L. Dawson and Mr. F. Dawson, from removing the infant from the State of New York. Before, however, this injunction was served, the infant had been re- \* 768 moved, and was subsequently sent to \* England, where she arrived in October, 1852. (The circumstances attending this removal and sending to England were variously represented by the different parties, but it was hardly denied that the intention of the proceeding, by whomsoever executed, was to place the

infant out of the power of Miss Jay.) Miss M. A. Dawson herself shortly afterwards left New York and came to England. On the 2d October, 1852, an order was obtained on the petition of Miss Jay from the surrogate of New York, revoking the appointment of Miss M. A. Dawson to be guardian of the infant, and appointing Miss Jay guardian in her place.

In the latter end of 1853, Miss Jay came to England for the admitted purpose of obtaining possession of the infant, with the view of taking her back to America; and she accordingly presented a petition in the matter, setting forth, among other things, the facts above stated, and praying that she, or some other proper person, might be appointed guardian. In 1854, the present suit of *Dawson v. Jay* was instituted, the bill in which prayed an account against Miss Jay of the real and personal estate of the plaintiff, and that guardians of the plaintiff might be appointed, and a suitable allowance made for her maintenance; and in this suit a petition was presented by the plaintiff praying that Miss M. A. Dawson and Mr. Pudsey Dawson might be appointed her guardians, and for maintenance. It may be here stated that, from her arrival in England down to the institution of the suit, the infant had resided with different members of her father's family, under the care of Miss M. A. Dawson and Miss E. G. Dawson, to both of whom it appeared that she was much attached.

The two petitions, namely, that of Miss Jay and of the plaintiff, came on to be heard before Vice-Chancellor \* STUART; and on the 4th March, 1854, his Honor, after seeing and conversing with the infant, as well as with Miss Jay and Miss M. A. Dawson and other relations, made an order appointing Miss Jay, Miss M. A. Dawson, and Mr. Pudsey Dawson, guardians of the infant, and directing the usual inquiries to be made in chambers as to the age, fortune, and relations of the infant, with liberty to the guardians, or any of them, to propose a scheme for the residence, maintenance, and education of the infant.

The inquiries directed by this order were proceeded with before the Vice-Chancellor's chief clerk, and proposals as to the residence and education of the infant were carried in on behalf of Miss Jay on the one side, and of Miss M. A. Dawson and Mr. Pudsey Dawson on the other. The main difference between the two plans was this: Miss Jay proposed to take the infant with her to America to educate and bring her up there, and the other guardians proposed

that she should continue to reside as she had hitherto done under the care of Miss M. A. Dawson, with a suitable provision out of her fortune for her maintenance and education.

Before the result of the inquiries directed before the chief clerk had been ascertained, the Vice-Chancellor, on the application of Miss Jay, made an order, (a) dated the 27th March, 1854, ordering Miss M. A. Dawson to deliver the infant to Miss Jay, to remain with her till further order. This order was immediately served; but, in consequence of the great opposition made by the infant to leaving the residence of Miss M. A. Dawson, it was found unadvisable to carry it into execution.

\* 770 \* On the 29th March, 1854, the plaintiff applied to the Lords Justices to discharge the last-mentioned order; and their Lordships directed that, without prejudice to the settlement of the scheme or any other question, the infant should not be removed from her present custody without the leave of the Lord Chancellor or Lords Justices; and that the appeal should, as to every thing else, stand over.

On the 30th March, 1854, the Vice-Chancellor's chief clerk certified the result of the inquiries made in pursuance of the order of the 4th March, 1854: he certified, among other things, that it was proper that 200*l.* a year should be allowed for the maintenance and education of the infant during her minority out of the income of her property vested in Miss Jay as guardian under the order of the Court in New York, and that it would be fit and proper, and for the benefit of the infant, that Miss Jay should be at liberty to remove the infant with her to New York, there to remain with her for her residence and education till further order, Miss Jay first giving security to obey the orders of the Court as to returning the infant to this country when required, and to account for her fortune. This certificate was approved by the Vice-Chancellor.

From the certificate of the chief clerk, so approved, the plaintiff appealed. The matter was to have been heard before the Lords Justices, but in consequence of their Lordships being engaged at the judicial committee of the Privy Council, and it being absolutely necessary for Miss Jay to leave England on the 5th April to return

(a) The grounds on which this order was made had reference solely to alleged circumstances of conduct in the parties, and had no bearing on any legal question in the case.

to New York, the Lord Chancellor appointed the parties to attend him at his private house.

*The Solicitor-General, Mr. Bacon, and Mr. Cairns* supported the appeal.

\* *Mr. Wigram and Mr. Lawford* were for Miss Jay. \* 771

April 3.

THE LORD CHANCELLOR. (a) — I have looked through the whole of the papers in this matter, and I have had all the facts before me: it is a case very unpleasant to deal with, but I feel no doubt as to the course I ought to pursue: I am not called upon to determine any thing as to the conduct of the parties in causing this young lady to be brought from America to England in the manner they did; I have only to direct what is now to be done. This young lady I must take, to all intents and purposes, to be a British subject: she is an orphan, having neither father nor mother: she has, however, and this is not complained of, three guardians, two of them being relations on her father's side, an aunt and cousin, and the other, her maternal aunt, an American lady of the highest respectability and of the best connections in that country: the property of the child is all in America. The question is, whether I am to order her to be sent to America, or to be kept here.

I believe that it used to be considered that the Lord Chancellor had no power, under any circumstances, to allow a ward to go out of the jurisdiction of the Court. Whether that was formerly so understood or not, it has certainly not been so understood in later times; for considerations of health, and a variety of other circumstances, may induce the Court to allow a ward of the Court to be sent abroad. I have myself sanctioned that course in reference to a ward of mature years, eighteen or nineteen years of age: in that case all the rest of the lady's family were, for very proper reasons, residing abroad, and I allowed her to go and join them. I know, \* however, of no instance in which this \* 772 Court (or rather the Lord Chancellor as representing the Crown, for that is described as being the nature of the jurisdiction), when exercising its jurisdiction in taking care of the subjects of

(a) This judgment was delivered by the Lord Chancellor in his private room at the House of Lords. •



this country, has ever so far abdicated its functions as to send a ward away to some other jurisdiction, where not only it may be, but as it appears in this case it certainly will be, that those who have the jurisdiction exercise it entirely independent of, and, in a sense (I do not use the word at all offensively), adversely to this country. They may probably, with just the same right motives as those which now actuate me, refuse to let the ward return to this country; and thus, if I permit her to go away, she may never be brought again within the jurisdiction of the Court. I know of no instance in which it has been done, nay, more, I very much doubt whether any functionary in this country has authority to compel a subject of this country thus to expatriate himself, for that is in truth what is proposed. I know it is said that this young lady is to go away until she is seventeen, and that the foreign guardian will undertake to bring her back again at a certain time; but that is an undertaking which there is no means whatever of enforcing. My opinion is, that I cannot sanction her removal, particularly after seeing and conversing with her, and being perfectly satisfied that she has the strongest, the most extreme, desire to remain under the guardianship of her paternal aunt, or rather I should say, for it is, so as far as this child is concerned, under the guardianship of her mother. I particularly asked her about that: her mother died long before she has any recollection, being then only three years and a quarter old, and she has never known any other mother but this aunt. It would then be the harshest course possible to tear this child, of between eleven and twelve years of age, from her

\* 773 mother (for that is what it means), and to \* leave her with relations whose attachment to her, however kind and attached to her they may be or however much she may be attached to them, must be a very different thing from the feeling which exists between her and her *quasi* parent. In my opinion, I have no right to take such a course, and, if I had the right, it would be exercising it in the present instance most harshly and most inexpediently.

I feel all the difficulties of the case, and I should have been extremely glad if it had suited the feelings of the guardians here, and suited the feelings of the child, that she should have gone to live where her property is, and where she is most naturally a subject. She is in truth a subject of both countries, and I think her connections with America would have been more natural, had she

not been brought when she was ten years old to this country ; but, considering all the circumstances, I think I have no other course to pursue than to say that I cannot concur with the scheme which has been adopted by the Vice-Chancellor, and that substantially I must uphold the scheme proposed on the part of the paternal guardians. I entirely enter into the feelings of the Vice-Chancellor, who said that it would have been extremely desirable if this question had been altogether avoided by the child having never been brought to England ; but having been brought to England I think I should be acting, perhaps not legally, and certainly not wisely, in sending her away from this, which is one of her natural countries, to be educated out of my jurisdiction, and where in truth I have no control. I have sketched the order which I propose to make.

*Mr. Wigram.* — If your Lordship should finally settle a scheme for the child's maintenance and education, and think it right that at any period of time she should go to \* America, \* 774 I would suggest that the Court may very properly make it a condition that, if the child should be allowed to go to America, the sanction of the Court there should be given to her return to this country : that, no doubt, may be obtained.

THE LORD CHANCELLOR. — It occurred to me that that might be done ; it may, however, be sufficiently provided for by giving liberty to all parties to apply. The order I propose to make will be to the following effect ; namely, — Having regard to the several affidavits referred to in the certificate of the Vice-Chancellor's chief clerk, and having myself personally examined the infant and being satisfied therefrom that she is very anxious to remain under the custody of her aunt and guardian Miss M. A. Dawson, and the two English guardians undertaking to supply the means necessary for the proper maintenance and education of the infant in case sufficient funds for that purpose are not transmitted from the United States arising from her property in that country, I order that the infant shall continue to reside with and under the care of Miss M. A. Dawson, at any place which to her and Mr. Pudsey Dawson may from time to time seem expedient ; and declare that it will be the duty of Miss M. A. Dawson and Mr. Pudsey Dawson to permit Miss Jay and the other maternal relatives to correspond

freely with the infant, and also to permit her and the other maternal relatives of the infant who may from time to time be in this country to have, as far as possible, free and unreserved access to and intercourse with her at all reasonable times : and I order Miss Jay from time to time to remit to Miss M. A. Dawson and Mr. Pudsey Dawson the clear income of the infant's real and personal estate in America, which shall come to her hands (meaning if it comes to her hands in such a way as she is capable of disposing of it, not as a mere agent and being \* bound to pay it into Court) ; and that Miss M. A. Dawson and Mr. Pudsey Dawson shall until further order pay the same when received, after deducting the yearly sum of 200*l.* to be applied for the maintenance and education of the infant, into Court to the credit of the cause : I reserve the question of costs, and all parties are to be at liberty to apply,—I was going to add the words, “ as to permitting the infant to make any temporary visit to the United States or otherwise as they may be advised,” but I think I had better not anticipate any such circumstances.

*Mr. Wigram.* — It might be advisable perhaps to insert them, as it might encourage Miss Dawson to take her to America.

THE LORD CHANCELLOR. — In reference to a remark that has been made as to Miss Jay resigning the guardianship, I have thought of it, and I do not think that I should allow her to do so. I have no doubt she will conduct herself with perfect propriety on the subject of the money ; but of course a material ingredient in giving or not giving her costs, will be the consideration whether she affords facilities for transmitting the child's fortune from the United States. I would have taken more time to consider this case, if the parties had wished it ; but I am perfectly sure that I could arrive at no other conclusion than what I have now stated, though a little further time might have enabled me to put my judgment in a more condensed form.

*Mr. Wigram.* — I think we understand it, my Lord. Your Lordship's view is, that the child must permanently remain here, unless it should be thought desirable, with the concurrence of the English guardians, that she should make a visit to America.

\* THE LORD CHANCELLOR. — I believe Lord ELDON is reported to have said, that under no circumstances would the Court allow a ward to be taken out of the jurisdiction; but I do not agree with that. I am to deal with the child as a parent would, but subject to the qualification that I have no right permanently to divest myself of the control over the child, which I should be doing if in this instance I were to send her out of the country. With regard to the temporary visits to America, I should think it the most desirable thing possible, if I could reasonably secure that the child would come back again; and the difficulty I have is, how to do that.

*Mr. Wigram.* — There is a suit pending in America, and no doubt the sanction of the Court in that suit might be obtained to her returning.

THE LORD CHANCELLOR. — I think it most likely that the Court in America would not allow a temporary visit to England, unless it had the security of the Court here; and I think I must act towards the Court in America as I have no doubt it would act towards this Court. (a)

1854. May 3, 25. Before the Lord Chancellor Lord CRANWORTH.

The Ecclesiastical Court granted probate of a will of personalty with cross lines drawn in ink over the bequests of certain legacies: *Held*, on a claim raised by the parties interested in these legacies, that the will must be taken to have been executed after the cross lines were drawn, and that the only question was, what was the meaning of the testator, and that this was that the legacies were not to stand part of the will.<sup>1</sup>

THIS was an appeal by the defendant, Margaret Gregory, as administratrix with the will annexed of the estate of John Thomp-

(a) The minutes of the order were drawn up, and settled by the registrar, in conformity with the judgment of the Lord Chancellor, the words "as to permitting the infant to make any temporary visit to the United States or otherwise as they may be advised," being added to the "liberty to apply."

<sup>1</sup> See 1 Jarman Wills (3d Eng. ed.), 22 *et seq.*

son, from a decision of Vice-Chancellor STUART, on the 3d May, 1853, disallowing exceptions taken by the appellant to the report of the Master, dated the 20th December, 1852, whereby he had certified, among other things, that certain legacies were given by the testator's will, which the appellant submitted were not given, on the ground that it appeared by the will, and the probate copy thereof, that the said legacies were contained in the second sheet of the will, in which second sheet there appeared divers cross lines, obliterations, erasures, alterations, and interlineations, by the effect of which the said legacies must be taken as struck out from the will, or rendered uncertain, unintelligible, and void: the facts were as follow.

The testator, John Thompson, died on the 6th March, 1843; and soon afterwards two several documents were produced, each being alleged to be his will; one was dated the 22d February, 1843, and the other the 5th March, 1843. The latter document consisted of three sheets of paper; the second sheet contained a variety of legacies and directions to his trustees, &c.; some of these were altered in pencil (for example, in one place, the name of Willis was altered into Ellis), and the whole of the sheet appeared crossed out by means of diagonal lines in ink, with the exception of certain legacies to individuals.

\* 778 \* Proceedings were taken in the Prerogative Court of Canterbury as to the two documents, the result of which was that, on the 20th June, 1846, a decree was pronounced by Sir H. J. FUST for the force and validity of the will as contained in the document of the 5th March, 1843, "with the several alterations, interlineations, and erasures appearing therein;" and on the 16th March, 1847, letters of administration with the will annexed, "as the same now stands," were granted to the defendant.

On the 15th May, 1849, a legatee's suit was instituted for an account and for payment of the legacies and annuities given by the will; and a decree was made on the 15th July, 1851, directing a reference to the Master to take an account, in the usual way, of legacies and annuities.

The Master made his report, dated the 20th December, 1852, certifying that the testator had among other legacies given the legacies which were brought in question by the present appeal; they were the legacies over which the cross lines had been drawn, as above mentioned. The defendant excepted to the Master's

report; and the matter was heard by Vice-Chancellor STUART, on the 3d May, 1853, when his Honor overruled the exceptions. The Vice-Chancellor relied on the case of *Cooper v. Bockett*, (a) the decision in which was to the effect, that in the absence of evidence the presumption must be that the lines drawn across the will were made after the execution of the will; and, being of opinion that the Ecclesiastical Court had left the question of what construction was to be put on the cross lines being drawn over the legacies open to the decision of the \* Court of Chancery, his \* 779 Honor held that the lines were not so drawn as under the late Act (1 Vict. c. 26) amounted to an alteration of the will in respect of the part underneath the lines. From this decision the defendant now appealed.

*Mr. Bacon* and *Mr. Murray*, for the appellant. — The lines must be assumed to have been drawn across the will before, and not after, its execution by the testator. The case of *Cooper v. Bockett* (a) does not apply, because there the probate was granted without the alterations, the Ecclesiastical Court having thus determined that they were not part of the will. Here the Ecclesiastical Court has, by granting the probate in fac-simile, held that the alterations were made before the execution of the will, and left it to this Court to put a construction upon them. That construction, we contend, must be that the testator did not intend the legacies crossed through to be part of his will. The provisions of the Act 1 Vict. c. 26 as to alterations cannot be referred to, for the form of the probate excludes any argument on that point. [They referred to *Mence v. Mence*, (b) *Francis v. Grover*, (c) *Shea v. Boschetti*. (d)]

*Mr. Wigram* and *Mr. Berkeley*, in support of the decision of the Vice-Chancellor. — This Court is placed in considerable difficulty by what the Ecclesiastical Court has done, and the only meaning that can be given to the fac-simile probate is, that all the legacies that are legible are to remain parts of the will: what other reason is there for leaving the lines?

\* [THE LORD CHANCELLOR. — They may be left to show \* 780 the meaning of the testator: suppose, for example, a case of

- (a) 4 Moore's P. C. Cases, 419. (b) 18 Ves. 348. (c) 5 Hare, 39.  
(d) Before the Master of the Rolls, 15 February, 1854, not reported.

CASES IN CHANCERY.  
this kind,—a testator says, “I give A. B. an annuity of 500*l.* and I give him also 1000*l.*,” and he then strikes out down to and including the words “500*l.*” ]

This Court may look at the original will to aid it in coming to a decision on the point of construction. *Philipps v. Chamberlaine*, (a) *Compton v. Bloxham*, (b) *Walker v. Tipping*. (c) It would be seen here that the pencil alterations made in the legacies contained under the cross lines must have been made after those lines were drawn, and, if so, the inference must be that the testator intended the legacies should remain part of the will.

*Mr. Bacon* was not called on to reply.

THE LORD CHANCELLOR. — I confess that I do not entertain any doubt on this case, though I say so with all deference, as the Vice-Chancellor and Master both agreed in taking a contrary view of it. The case of *Cooper v. Bockett* (d) established this principle, namely, that *primâ facie* the presumption of law is that alterations and erasures in a will are made after the execution;<sup>1</sup> but that principle has no application to the present case, because the probate has been granted with the alterations on it. I may here remark that I am not one of those who think that it is competent for this Court on every occasion to look at the original will, though

I am aware that Lord ELDON did it in some instances, but \*781 in each there were particular \* circumstances.<sup>2</sup> I think it must be taken as conclusively settled by the Ecclesiastical Court, that the will was at its execution in the state in which we

(a) 4 Ves. 51.

(c) 9 Hare, 802, note (b).

(b) 2 Coll. 201.

(d) 4 Moore's P. C. Cases, 419.

<sup>1</sup> See 1 Jarman Wills (3d Eng. ed.), 134, 135; (4th Am. ed.) 170, 171; *Simmonds v. Rudall*, 1 Sim. N. S. 115; *Burgoyne v. Showler*, 1 Rob. 5; 8 Jur. 814; 3 No. Cas. 20; *Re Thompson*, 3 No. Cas. 441; *Shallcross v. Palmer*, 16 Q. B. 747; 15 Jur. 836; *Greville v. Tylee*, 7 Moore P. C. C. 320; *Tatum v. Catomore*, 16 Q. B. 745; S. C. *nom.* *Tutham v. Cattamore*, 20 L. J. Q. B. 364; *Chitty Contr.* (10th Am. ed.) 870–873 and notes.

<sup>2</sup> See 1 Jarman Wills (3d Eng. ed.), 23, 24, 134; *per* Lord Justice KNIGHT BRUCE in *Manning v. Purcell*, 24 L. J. Ch. 523 *n*; 7 De G., M. & G. 55; *Compton v. Bloxham*, 2 Coll. 201; *Child v. Elsworth*, 2 De G., M. & G. 683; *Oppenheim v. Henry*, 9 Hare, 802 *n*; *Gauntlett v. Carter*, 17 Beav. 590; *Milsome v. Long*, 3 Jur. N. S. 1073; *Taylor v. Richardson*, 2 Drew. 16; *Shea v. Berchetti*, 18 Beav. 321; *Havergal v. Harrison*, 7 Beav. 49.

now find it; that is, that the testator executed the instrument with the cross lines drawn over it. That being so, the question is, what does the instrument mean? It has been suggested that the lines were on the paper before the testator wrote his will; but I must deal with that as if the matter was before me as a jury, and I cannot believe that the case is such as is suggested; it is an extravagant supposition. The meaning of the lines being drawn is, that what the testator had intended as to giving the legacies over which they are drawn had ceased to be his intention, and he therefore placed the lines there to show this; he meant to strike out the legacies. It is then said that there are pencil alterations of these legacies. If these were made before drawing the lines, they would be nothing, and, if after, still that would not satisfy me that the crossing out was not to have its natural effect; they do not erase the crossing out. I believe they were made before, but the circumstance makes no difference. The result is, that all the legacies were struck out, and that the exceptions taken to the Master's report and this appeal must be allowed.

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\* HICKS v. SALLITT.

\* 782

1853. November 21, 22. December 5, 6. 1854. January 14. Before the Lord Chancellor Lord CRANWORTH and the LORDS JUSTICES.

The manor of W. was by settlement vested in trustees upon such trusts as E. B., a married woman, should by will appoint: before any will was made a piece of copyhold land was under an Inclosure Act allotted to the trustees of the settlement as lords of the manor and in compensation of their interest in the soil of the manor: under the same Act two copyhold allotments were made to two other persons in respect of copyhold interests: the trustees of the settlement in exercise of a power vested in them for that purpose bought the two last-mentioned allotments and held them upon the same trusts as the manor: afterwards in 1807, E. B. made her will devising the manor with its appurtenances to the father of the plaintiff for life, with remainder to his first son in tail, with remainder to his second son the plaintiff, and devising the residue of her property to trustees on trust to sell: E. B. died in 1813, and the copyhold allotment made to the trustees of the settlement and the two allotments purchased by them were then treated by the trustees of the will as part of the residue, and in 1814 were sold to a person from whom the defendant subsequently purchased. The plaintiff while an infant became entitled in



1831 by the deaths of his father and elder brother to the manor under the devise: he attained twenty-one in 1849, and soon afterwards filed a bill claiming the three allotments as part of the manor: *Held*, that, as to each allotment, there had been under the circumstances an extinguishment of the copyhold in the manor, and that they all passed to the plaintiff under the devise of the manor, there being nothing on the face of the will to show that the testatrix intended to use the word in any other than its ordinary legal meaning.

*Held*, also, that the plaintiff was entitled to an account of rents and profits from the time his title accrued in 1831.

The rule is that, in the absence of special circumstances, a party found to be wrongfully in possession of property is to account for rents and profits during the whole period of time that his wrongful possession has continued.<sup>1</sup> The authorities on this point referred to and observed upon, and the decision in *Drummond v. The Duke of St. Albans*, 5 Ves. 433, held not to be law.<sup>2</sup>

THIS was an appeal by the defendants from a decree made by Vice-Chancellor WOOD in a suit instituted by the plaintiff, W. H. Hicks, as devisee under the will of Mrs. E. Barker, to recover possession of certain property held by the principal defendant, M. Sallitt, who was in possession, and who claimed to retain it as purchaser from R. Buxton, who had purchased from the trustees of Mrs. E. Barker's will. The right thus in dispute depended on whether the property in question passed by a specific devise of the manor of Watton Hall contained in Mrs. E. Barker's will, or was comprised in the general devise of the residue of her \* 783 property to trustees \* in trust to sell. The circumstances of the case may be stated as follows.

In 1796, Mrs. E. Barker, the testatrix, then Mrs. E. Hicks, widow, was seised in fee-simple of the manor of Watton Hall in Watton, in the county of Norfolk. By a settlement made on occasion of her marriage with Mr. Barker, dated the 14th May, 1796, this manor was limited, together with other property, to J. F. Francklin and his heirs (in the event which actually happened), upon such trusts as Mrs. E. Barker should by deed or will attested as therein mentioned appoint, and subject thereto with limitations over. In the year 1801 (41 Geo. 3), an Act was passed entitled "An Act for dividing, allotting, and enclosing the open or common fields, half-year or shacklands, lammas meadows, fens, com-

<sup>1</sup> See *Penny v. Allen*, 7 De G., M. & G. 409; *Wright v. Chard*, 1 De G., F. & J. 567; *Lewin Trusts* (5th Eng. ed.), 642, 643.

<sup>2</sup> See *Lewin Trusts* (5th Eng. ed.), 642.

mons, and waste-lands within the several parishes of Watton and Carbrooke in the county of Norfolk;" and in this Act it was recited that J. F. Francklin was or claimed to be lord of the manor of Watton Hall as being trustee for Mrs. E. Barker, and among other things it was enacted, that the commissioners should "set out and allot unto and for the respective lord or lords, lady or ladies, of the soil of the said commons and waste-lands, or their respective assigns, such part of the lands and grounds hereby directed to be divided and allotted within the said parishes of Watton and Carbrooke respectively as in the judgment of the said commissioners shall be a full recompense and compensation for his, her, or their right or rights in and to the soil of the said commons and waste-lands respectively;" and by another clause in the Act it was directed that the several allotments which should be made in respect of freehold or copyhold should be held to be according to the same nature and tenure as the rights in respect of which they were allotted. In October, 1803, P. R. Taylor and E. H. Grigson were appointed trustees \* of Mrs. E. \* 784 Barker's marriage settlement in the place of J. F. Francklin, and the trust estates were duly conveyed to them; and by a contemporaneous deed certain personal estate was vested in the same trustees upon trust to lay it out in the purchase of land, which land when purchased was to be held on the same trusts as the real estate already settled. On the 24th December, 1803, the commissioners under the Act allotted to P. R. Taylor and E. H. Grigson, as lords of the manor of Watton Hall as trustees for Mrs. E. Barker, a piece of land Lot No. 1 as compensation for their interest in the soil of the manor: they also allotted another piece of land Lot No. 2 to the devisees of Thomas Scott deceased in respect of certain copyhold interest; and another piece of land Lot No. 3 to Thomas Scott as entitled under a settlement dated the 3d June, 1791, called hereafter, for the sake of distinction, Crockley's settlement, also in respect of copyhold interest. (a) In 1804, P. R. Taylor and E. H. Grigson applied a part of the trust moneys in their hands in the purchase of lot 2 from the devisees of Thomas Scott; and soon afterwards they purchased out of the trust moneys lot 3 from the parties interested under Crockley's settlement: both these lots were duly surrendered to them.

(a) There were other lots included in the purchases by the trustees besides those mentioned, but two only, Nos. 2 and 3, are specified.

10 CASE IN CHANCERY

The trustees of Mrs. E. Barker being thus in possession of Lot No. 1 allotted to them as lords of the manor, and of the Lots Nos. 2 and 3 by purchase, the whole of these pieces of land were together with other lands thrown into one estate called Neaton Farm, and in June, 1807, it was leased to R. Buxton for a term of thirteen years from Michaelmas, 1806. The plaintiff's case \* 785 was \* that the several lots having become vested in the lord of the manor, there had been an extinguishment as to them of the copyhold, and that they had become part of the manor.

On the 4th December, 1807, Mrs. E. Barker made her will in pursuance of the power reserved to her by her marriage settlement, and after various devises (among others a specific devise of a certain copyhold tenement to which she afterwards referred in the third codicil to her will as being part of her residuary estate), she directed and appointed (amongst other hereditaments) all that the manor or reputed manor of Watton Hall in Watton in the county of Norfolk, together with all courts leet and courts baron, fines, quit-rents, and profits of courts, and all other the rights, members, privileges, advantages, and appurtenances, to the manor or lordship, or reputed manor or lordship, belonging or appertaining to, and to the use of, J. S. Watts and W. Grigson, their executors, administrators, and assigns for and during the full term of eight hundred years, to commence and be computed from the day next before the day of her decease (this term had since become satisfied and determined), and subject to the term, to, and to the use of, John Raby Hicks (the father of the plaintiff) and his assigns for his life, with remainder to the use of the first son of the said J. R. Hicks and the heirs male of the body of such first son, and on failure of such issue to the use of the second, third, fourth, fifth, and all and every other son and sons of the said J. R. Hicks severally and successively in remainder as they should respectively be in seniority of age and priority of birth and their several and respective heirs male of the body or several and respective bodies of the same son or sons respectively, every elder of the same sons and the heirs male of his body issuing \* 786 being always to be preferred to and take \* before the younger of the same sons and the heirs male of his body issuing, with divers remainders over : and the testatrix directed that these limitations and appointments should extend as well to the lands and hereditaments settled on her marriage as to any hereditaments

since purchased or received by way of exchange or allotment, as far as the said lands and hereditaments were comprehended within the descriptions before contained: and the testatrix directed and appointed all the residue and remainder of her real estate situate at Watton aforesaid and towns next adjacent over which she had any power of appointment unto Robert Harvey and John Hebgin, their heirs and assigns, upon trust that they or the survivor of them, or the heirs of such survivor, should as soon as conveniently might be after her decease sell and dispose of the same real estate either together or in parcels, and either by public auction or by private contract, and should convey and assure the same when sold unto the person or persons who should agree to become the purchaser or purchasers thereof, and to his and her or their heirs or assigns for ever, or to such person or persons and to such uses and for such purposes as he, she, or they should direct and appoint, and should stand possessed of the money arising from such sale as aforesaid upon the trusts in the will expressed and declared of and concerning the same: and the testatrix appointed R. Harvey and J. Hebgin to be executors in trust of her will.

The testatrix made several codicils to her will, the last of which was dated in October, 1812. In the second codicil, dated in February, 1812, she corrected a minute mistake as to the amount of the rent of one of the properties given by her will; and in the third she referred to the direction to sell the residue of her real estate, and revoked the direction as to two cottages which she then gave to two of her servants; one of these cottages, both \* of which were copyhold, was not in fact included in the \* 787 residue, but had been specifically devised as above stated.

The testatrix died on the 24th July, 1813, at which time W. Mason and E. H. Grigson were the trustees of the marriage settlement, the former having been substituted for P. R. Taylor, who had died. In 1814, R. Buxton purchased from the trustees of Mrs. E. Barker's will the property so held by him as tenant as before mentioned, and the same was duly conveyed to him, the property being treated as part of the residue, and as therefore held in trust for sale under the directions contained in the will. R. Buxton remained in possession till his death in 1835: the principal defendant in the present suit, M. Sallitt, purchased the property from the trustees of the will of R. Buxton, and was in possession at the time of the filing of the bill.

J. R. Hicks, the father of the plaintiff, and to whom the manor of Watton Hall was devised by Mrs. E. Barker's will as before mentioned, died on the 27th November, 1828, leaving two sons and no more; namely, the plaintiff and his elder brother, both infants. The plaintiff's elder brother died on the 1st June, 1831, an infant, and the plaintiff, who then became entitled, attained his age of twenty-one on the 23d October, 1849.

In December, 1850, the plaintiff filed his bill, charging that the pieces of land before mentioned as lots 1, 2, and 3, respectively sold by the trustees of Mrs. E. Barker's will to R. Buxton, were part of the manor of Watton Hall, and as such belonged to the plaintiff under the devise contained in the will, and praying that the same might be decreed to be conveyed to the plaintiff \* 788 accordingly, and that an account might be taken \* of the rents and profits of the premises as from the 1st June, 1831.

The cause was heard before the Vice-Chancellor Sir W. PAGE WOOD, in February, 1853, when his Honor made a decree in favour of the plaintiff as prayed by the bill. His Honor thought that he could not arrive at the conclusion that it was the intention of the testatrix to sever the manor from the copyholds which had fallen into it; that the extinguishment of the copyholds in the manor was made out; and that, as the result of the whole case, the defendant M. Sallitt must be treated as a trustee of the rents and profits of the property for the plaintiff as from 1831. From this decision the defendants now appealed.

*The Solicitor-General, Mr. Rolt, and Mr. Selwyn*, for the plaintiff, supported the decision of the Vice-Chancellor. — They stated the facts of the case, and noticed shortly the various arguments which had been relied on by the defendants on the previous hearing. They contended that M. Sallitt took the property with full knowledge of the state of the title, and that, under the circumstances of the case, nothing passed to him but a dry trust, and that the decree appealed from was therefore correct.

*Mr. Wigram and Mr. Toller*, for the appeal. — It is submitted that the Vice-Chancellor was wrong on two main points: first, as to the construction to be put on the word "manor" in the will of Mrs. E. Barker; and, secondly, in directing an account of the rents

from 1831 instead of from the filing of the bill. On the first it is contended that the testatrix used the word "manor" merely in a popular sense; she meant by it manorial \* rights only, \* 789 and did not intend to include appurtenances of a more corporeal nature; she never could have contemplated that part of Neaton Farm, the greater portion of which clearly passed as residue, should be severed from it and joined to the manor of Watton Hall; and it must have been her intention that the territorial incidents of the manor should fall into the residue. The frame of the will which was an appointment under a power, the terms of the settlement by which that power was given, and the circumstances of the property, all confirmed this view of the case. The third codicil especially was strongly in favour of the argument, for by it the testatrix, wishing to dispose of two copyhold cottages in a particular manner, revoked the gift of the residue as to them, thus showing that she intended copyholds to pass as residue, and not by the devise of the manor. [They referred to *Moseley v. Motteux*, (a) *Doe v. Williams*, (b) *Cholmondeley v. Clinton*, (c) Coke's Compleat Copyholder, § 31, pp. 54, 55, 60.] The conclusion on this point is that it is not shown that the lands in question passed as part of the manor. In connection with this portion of the case, it is submitted, that the fact of the extinguishment of the copyholds in the manor is not made out as to either lot 1, lot 2, or lot 3. (d) [In reference to the question raised as to lot 1, they referred to *Doe v. Davidson*, (e) and as to lot 2, to *Habergham v. Vincent*. (g)] On the second main point, as to the period from which the account of rents and profits ought to be taken, it is submitted that, this being a case of entire mistake and the whole transaction being *bonâ fide*, the account ought to have been directed only \* from the filing of the bill. The decision in \* 790 *Drummond v. The Duke of St. Albans* (h) is a clear authority in favour of this proposition; in charity cases also the Court acts on the same principle. *Attorney-General v. The Mayor of Exeter*, (i) *Bromley v. Holland*. (k)

(a) 10 M. & W. 533. (b) 11 M. & W. 803. (c) 2 J. & W. 1, pp. 91, 92.

(d) The point here raised will be sufficiently seen by the notice taken of it in the judgment of the Lord Chancellor.

(e) 2 M. & S. 175.

(i) 2 Russ. 362.

(g) 2 Ves. Jr. 204, p. 233.

(k) 5 Ves. 610.

(h) 5 Ves. 433; see also 3 Ves. 25.

CASES IN CHANCERY.

[The Lord Justice KNIGHT BRUCE referred to the cases collected, with *Drummond v. The Duke of St. Albans*, in Chambers on Infancy, p. 694.

THE LORD CHANCELLOR. — We all think that if the plaintiff had been adult we should not have given the account further back than the filing of the bill; but what we wish to direct attention to is, the present being the case of an infant, and as to this we are in doubt.]

The case of *Pickett v. Loggon*, (a) where the account was only carried back to the filing of the bill, is very similar to that of an infant: the parties there were poor and destitute of proper advice. [They cited *Edwards v. Morgan*, (b) *Bowes v. East London Waterworks*, (c) *Clarke v. Yonge*. (d)] At all events it is submitted that the account cannot be carried back for more than six years.

[The Lord Justice KNIGHT BRUCE mentioned *Pulteney v. Warren*, (e) and observed that the grounds stated by Lord ELDON in his judgment in that case for confining the account of rents and profits to the filing of the bill, did not apply to the case of an infant.

THE LORD CHANCELLOR mentioned *Grant v. Ellis*. (g)]

\* 791     \* *The Solicitor-General*, in reply. — The argument as to the word “manor” really comes to this: if a man by will gives an estate, and then in the same instrument gives his fields A. and B., if these fields form part of the estate devised, the latter gift will limit the generality of the description of the first devise and confine it: there is no rule to warrant such a mode of construction as this. The word “manor” beyond all dispute will include rights and appurtenances of the nature of those now in question, and to adopt the argument on the other side would be making indeed wild work with the rules of interpretation. When a word has a known legal meaning, it must be taken to be used in that meaning, unless the party using it clearly shows that he uses

(a) 14 Ves. 215.

(b) M'Clel. 541; see p. 554.

(c) 3 Madd. 375.

(d) 5 Beav. 523.

(e) 6 Ves. 72, p. 93.

(g) 9 M. & W. 113.

it in a different sense. [He referred to *Doe v. Martin*, (a) as an answer to the argument on the other side, drawn from the terms of the will and the expression contained in the third codicil; and then noticed the various points raised as to the extinguishment of the copyholds in the manor, citing *Roe v. Aistrop*. (b)] The important question is as to the account, how far back that is to be carried. The principal defendant here, under the circumstances of the case, holds in express trust for the plaintiff; and this Court, though guiding itself by analogy to the Statute of Limitations, is not bound to follow that statute. *The Attorney-General v. The Brewers Company*. (c) If the plaintiff's title had been at law and he had recovered in ejectment, he could have claimed back rents from 1831. *Grant v. Ellis*, (d) *Dean of Ely v. Bliss*. (e) There is no ground in principle or reason why the trustee should be excused, and the plaintiff not have his full measure of relief. The decision in *Drummond v. The Duke of St. Albans* (g) is beside the point; it was the case of a common error, all the parties were *sui juris*, there was no breach of trust, and it was not a case between trustee and *cestui que trust*. It is submitted that there is nothing to justify an alteration in the Vice-Chancellor's decree.

THE LORD CHANCELLOR.—This case is one of considerable nicety, requiring the exercise of great discretion on the part of the Court in giving its judgment, because it is almost impossible not to have a strong leaning in favour of the defendant; he is in possession of property purchased by him several years ago, from a vendor who bought it many years previously, and paid, for any thing that appears to the contrary, a full consideration for it, and the difficulty which is now raised against the title is one that might well have escaped the observation of persons using ordinary care and vigilance. A party filling such a position ought not certainly to be disturbed unless the case is clearly made out against him; but when it is made out, the Court must decide in favour of the plaintiff who raises the objection without any displeasure against him for asserting that which, according to the result, is shown to

(a) 4 B. & Ad. 771.

(b) 2 W. Black. 1228.

(c) 1 Mer. 495.

(d) 9 M. & W. 113.

(e) 2 De G., M. & G. 459.

(g) 5 Ves. 433.



be his legal right. The facts of the case arise thus: — [His Lordship here stated the facts to the effect before set out.]

The case made by the bill is, that the trustees of Mrs. Barker's will by becoming purchasers of the copyholds, or taking a surrender of them to themselves who were lords of the manor, and not to trustees so as to keep them separate from the manor, \* 793 caused an extinguishment \* of the copyholds in the manor, and consequently that by the devise of the manor in Mrs. Barker's will, the copyhold allotments passed as parcel of the manor. It was contended, that by the devise in question all that really belonged to the manor necessarily passed, including not only what had formerly been part of it, but also the copyholds which had become parcel of the demesne of the manor under the circumstances I have mentioned.

The general principle involved in this contention does not admit of any doubt, for it cannot be disputed that the devise of a manor will carry every thing which, having originally been copyhold of the manor, has, after the devise and before the testator's death, ceased to be copyhold only because it has been surrendered to the lord to his own use. But then it is said that although that is true as a general proposition, yet it is competent to every testator to be his own interpreter if he chooses so to be, and that he may say that by the word "manor" he does not mean to include the copyholds that he has since purchased, and which in that way became part of the manor. There is no doubt also of that proposition; but when a testator uses a word which has a well-known ordinary acceptance, it must appear very certain that he has said on the face of the will that he uses it in another sense before the ordinary sense can be interfered with. The question then is, whether there is on the face of this will any thing that indicates so clearly that by "manor" the testatrix did not mean to include all that by law is included in it, that she must be considered as not having included the copyholds which had been purchased in the general designation. I have, I confess, a suspicion that the defendant is right when he says that Mrs. Barker did not think that by "manor"

she would pass these copyholds, but that is not enough: in \* 794 order \* to alter the meaning of the word it must appear, not that she might have meant it in a different sense, but that she must have meant it in a different sense, and this can only be shown by pointing out either some inconsistency in different

parts of the will, or a positive statement of such being the sense intended, or a *reductio ad absurdum* by not taking the word in a qualified sense.

The grounds which have been relied on in support of the defendant's case on this point amount to this ; namely, that certain expressions can be found which are consistent with the testatrix not having understood the word "manor" in its proper sense : the proposition, however, to be established is, that they are inconsistent with her having used it in its proper sense, and I think none of the objections go so far as that. In the first place it is said that the testatrix in devising the manor has used words which, if she supposed the copyholds in question to be part of the manor, would be tautological ; but this argument, if pushed to the extent that words must be always understood in a qualified meaning where they are accompanied by expressions which would be tautological if they are not so understood, would alter the meaning of almost every conveyance or will that was ever drawn. It was next said, that among a number of items which are added to the devise of the manor, there is a devise of property which was originally copyhold, and it was argued that the testatrix would not have thus added it, if she had meant it to be included in the manor. Perhaps she might not, but probably she did not know that it was part of the manor, and exactly the same observation applies to this as to the last objection, of which it is in fact a branch. The third codicil was then referred to, in which the testatrix treats a particular copyhold cottage as part of the residue, which was in fact \* part of the manor. This again \*795 is an argument of the same sort as the others which I have already noticed : all that it proves is, that she did not know whether the cottage was part of the manor or not, and her only anxiety was, that it should go to the person mentioned in the codicil and to no one else. It was also said that the word "manor" was to be taken as used in the will in the same sense in which it was used in the settlement ; but the substratum of this argument failed, for it was not shown that the word was used in the settlement in any but its ordinary sense. The result is, that every estate which was so purchased as to become in point of law parcel of the manor, and constituting a demesne of the manor, passed under the devise of the manor.

A question was then raised as to whether the copyholds, though

surrendered to the use of the lord, or rather the lord's trustees, the lords of the manor, were so surrendered as to unite them with the manor. As to lot 1 (the allotment which was made to the lord in right of the soil by the commissioners under the Act of Parliament), it was said that it did not follow that it became parcel of the manor, for it might be a distinct inheritance independent of the manor. In support of this view, the decision in *Doe v. Davidson*, (a) before Lord ELLENBOROUGH, was relied upon. That was the case of a parish in the north of England, consisting of a great number of customary freeholds, which I take for the present purpose to have been on the same footing as copyholds: the lord and the copyholders, or customary freeholders, entered into an agreement to make a division of their lands; and having done so, the lord taking a certain portion, and each of the freehold-  
\* 796 ers taking a portion, \* they obtained an Act of Parliament confirming what they had done; and then the question arose, half a century afterwards, whether the allotments which the copyholders or the customary freeholders had taken were affected by the customary rules of descent, or whether they became freeholds descendible according to the common law: the case was very fully argued, and a very elaborate, and, I think, most satisfactory judgment was given by Lord ELLENBOROUGH, who decided that they took freeholds descendible as at common law. Parties cannot by their own act create a new course of descent, and what the parties there agreed to was, that they would divide the lands and make each owner of the common rights the owner of a particular piece of land absolutely in lieu of his common rights; and the legislature sanctioned that, but it did not introduce any clause saying that the lands should be of any other tenure than the lands of the rest of her Majesty's subjects. The Court of Queen's Bench therefore held that the parties did not create a new tenure, and that the rule of descent that prevailed in other lands in that manor did not attach on the divided lands. I think that was perfectly right; but even if that had not been so held, the decision would not have touched the case of land allotted to the lord. When land is spoken of as allotted to the lord, it is meant that whereas the lord had previously the right of soil over the whole common, subject to rights of common in the tenants which made

(a) 2 M. & S. 175.

that right of little or no value, a certain portion of land is, on a division being made among all the parties interested, kept by the lord free from any common rights, the rest of the land being apportioned amongst the commoners. • The question here having reference to that portion of land kept by the lord, it would seem that, as a matter of course, it must be kept by him as part of that which it was before; namely, his manor. Even if \* the other lands became freehold instead of copyhold, \* 797 which they would not here because the Act of Parliament expressly says they are to be copyholds, that would not alter the quality of the land which all along was the land of the lord; it would continue the same after as before the inclosure. That distinguishes the present case from *Doe v. Davidson*, even if *Doe v. Davidson* could have had any application to the copyholds; but it is in fact inapplicable, because there is an express and particular clause in the Act of Parliament, making all the allotments to the copyholders, in respect to copyhold rights, copyhold lands. Then the circumstance which appeared, that there was another manor besides that of Watton Hall mentioned in the Act, was relied on, and it was said that it was not clear that the allotment in question was made out of lands that were originally parcel of the lands of Watton Hall. I think, however, that makes no difference, for the clear meaning of the legislature was, that for the purpose of the inclosure it was all to be treated as one manor. It seems to me, therefore, that the allotment in question became to all intents and purposes parcel of the manor, and so passed under the devise.

That brings me to the other two cases, namely, the purchase from Scott's devisees (lot 2), and the purchase from the parties interested under Crockley's settlement (lot 3). With respect to the first of these it was said, that there was no extinguishment of the copyhold rights by reason of the peculiarities that attached on the title of Scott's devisees. Their title arose thus; in 1763, on the marriage of Mr. Scott, certain copyhold lands held in this manor were settled on Mr. Scott for his life, with remainder to trustees for a term to secure a jointure to his wife, with remainder to the heirs of the body of the wife by the husband. (The form of the \* deed was a settlement of the freeholds and a \* 798 covenant to surrender the copyholds to the same uses.) There was issue of the marriage two sons, and in 1791, they being both of age, but not being able to suffer a valid recovery

because they were only contingent or rather expectant remaindermen in fee, concurred with their father and mother in suffering a copyhold recovery. It appears that before suffering the recovery the copyholds were surrendered to the use of the settlement, this not having been previously done. Subsequently, the inclosure took place, and allotments were made to Scott's devisees, he having then died and his widow having survived him; and Scott's devisees sold to the trustees of Mrs. Barker's settlement and surrendered. Nothing more was at that time done to complete the title, which was certainly defective, because the recovery suffered in 1791 had been ineffectual to bar any estate tail that was in existence, for the reason before stated. The title was also defective, because, applying to copyholds, as is done in the case of *Lane v. Pannell* (a) adopted by Mr. Fearn, the doctrine that a particular estate must continue until the time when the estate in remainder comes into possession, Mr. Scott having died leaving his wife surviving, the remainder to the heirs of the body of the wife by the husband never took effect, for the particular estate was determined before it came into *esse*. After the death of Mrs. Barker, however, when the sale by the trustees of this property took place, the blot was hit by the conveyancer that the recovery was ineffectual by reason of its being suffered at a time when there was no tenant in tail in existence; and in order to cure the defect, the then eldest son, his mother being dead, suffered another recovery, and confirmed the title. The question thus is, \* 799 whether this proceeding \* had the effect of so making good the title, and whether the devise of the manor which took place before the title was thus confirmed, can be held to include this allotment. On this part of the case I had in the course of the argument considerable doubts, but those doubts have been entirely removed. It appears that no surrender was made in 1763 in pursuance of the covenant in Mr. Scott's settlement, but that it was made in 1791 when the first recovery was suffered. I am strongly inclined to think that that enured as a surrender to the use of Mr. Scott and his wife for life, with remainder to the heirs of the body of the wife. That, however, may be questioned, and it does not seem to me to signify whether it did or not; because if it did not, then Mr. Scott and his wife had the copyhold

(a) 1 Rolle, 438.

fee. Whatever interest they had became vested in the trustees of Mrs. Barker's settlement, and the utmost that can be said (putting it in the most favourable way for the defendant) is, that the title of the trustees was possibly liable to be defeated at the instance of the heir of the body of Mrs. Scott after her death. Then the question being, whether, Mrs. Barker having made her will after the purchase, the devise of the manor included the land so purchased: the answer must clearly be that it did. That there might by possibility be an equitable right attaching in others which might thereafter be enforced could not be said to prevent it in the mean time from becoming parcel of the manor. The owner of the manor might be liable to some proceeding at the instance of the party having the dormant equitable right, but that equitable right was barred by what took place afterwards; so that the result is, that the manor passed without any equitable claim capable of being set up by the person claiming under Scott.

It now remains to consider the case of lot 3, taken \* under Crockley's settlement. The state of the title ap- \* 800 pears to have been this: Crockley made a settlement of freeholds to the use of himself for life, with remainder to another person of the name of T. Scott for life, with remainder to his wife for life, with remainder to the use of the first and other sons in tail in the usual way: there was a covenant to surrender copyholds, including lot 3, to the same uses: the settlement contained a general power of sale in T. Scott and his wife. That being the state of the title, and Crockley having been admitted and being dead, T. Scott and his wife, having at that time been admitted to no more than a tenancy for life, agreed to sell and did sell to the lords of the manor. There is a little doubt in my mind how far the admission of T. Scott and his wife enured as an admission for those in remainder; but it seems to be immaterial, because by the sale made under the power contained in the settlement, they had sold to the lords of the manor all their estate and interest, and this Court would have enforced it in favour of the lords. The lords therefore had the legal title to the manor as against Scott and his wife, and an equitable right at any time to call for a surrender from any one else in whom there might be an outstanding legal estate. Thus the lot in question constituted part of the manor and fell into it, and must like the rest be held to have passed under the devise to the present plaintiff's father for

life, with remainder to him in tail. The plaintiff thus clearly succeeds in establishing his title to have these copyholds, which form parcel of the manor as devised, conveyed to him.

There now remains the extremely important and difficult question ; namely, during how long a portion of time ought the Court to give an account of the rents. Though we have disposed of the main question in the cause, as we have no doubt upon it, \* 801 we think it will be more satisfactory \* to the Court and to the parties, and conduce to the interest of those who are to be guided by our judgment hereafter, that we should take a little further time to consider the different authorities which have been cited on the last point.

I may add that we are quite clear that there ought to be no costs of this appeal, because it is an appeal rendered necessary by the very careless way in which the testatrix has disposed of these extensive estates. It was a very reasonable subject to bring under the consideration of the Court: the plaintiff brought it before the Court below, and it was reasonable on the part of the defendant, who had been so long in possession and who had been led into that position by the carelessness of the testatrix, to bring the decision by way of review before us. There will therefore, under the circumstances, be no costs of the appeal, and the deposit will be returned.

1854. January 14.

THE LORD CHANCELLOR. — This case stood over for the Court to give judgment on one point only (the other points being disposed of), which was as to the period of time during which the account was to be directed in favour of the infant plaintiff.

The way in which I view the matter is this: if the estate had not been in trustees, but it had been a mere legal devise, the plaintiff in an action of trespass for mesne profits might without doubt have recovered all the rents that accrued during his minority,

for although in such an action the defendant might have \* 802 pleaded \* the old Statute of Limitations of James I., yet the infant plaintiff could have replied that during that time he was an infant, and it would have been a good replication. That being so, I should be very loath to introduce the application of a different rule to what is technically an equitable estate from that which is applicable to what is technically a legal estate ; such distinctions are rather discreditable to our institutions, for there

is no real difference between the cases, and the same principle ought to be acted on in each; it is, in fact, an instance in which I should have said that the maxim *equitas sequitur legem* ought to prevail.

In order, however, to show that what I have just stated is not a correct view of the subject, the decision in *Drummond v. The Duke of St. Albans* (a) was mainly relied upon. Before, however, advertng to that case, I will call attention to some of the more leading authorities in chronological order, and they will, I think, be found to illustrate the opinion I have expressed. The earliest case to which I shall advert is that of *Dormer v. Fortescue*, (b) and I cite it only for the sake of some observations of Lord HARDWICKE; he there says, "But as I said before, there are several cases where this Court does decree an account of rents and profits, and that from the time the title accrued. As where a man brings his bill in this Court, where there is a trust, and upon a mere equitable title, there he shall recover the estate, and the Court will give him an account of the rents and profits, and that from the time the title accrued, unless upon special circumstances, and then they will restrain it to the time of bringing the bill, as where the defendant had no notice of the plaintiff's title nor had the deeds and writings in his \*custody, in which the plaintiff's \* 803 title appeared, or where the title of the plaintiff appeared by deeds in a stranger's custody. So where there hath been any default or laches in the plaintiff, in not asserting his title sooner, but he has lain by, there the Court has often thought fit to restrain it to the filing of the bill. So in the case of a bill brought by an infant to have possession of the estate, and an account of rents and profits, the Court will decree an account from the time of the infant's title accrued, for every person who enters on the estate of an infant enters as a guardian or bailiff for the infant."<sup>1</sup> The principle laid down here is, that unless there be laches, or unfair dealing, or something to take the case out of what Lord HARDWICKE considers to be the general rule, *prima facie* the party is to account for rents during the period of time he has been in possession: that was the rule upon the old authorities.

The next case is *Pettiward v. Prescott*, (c) before Sir W. GRANT, and this and the other cases I am about to cite, together

(a) 5 Ves. 433.

(b) 3 Atk. 124, p. 130.

(c) 7 Ves. 541.

<sup>1</sup> Lewin Trusts (5th Am. ed.), 639, 641; *Schroder v. Schroder*, Kay, 591; *Pascoe v. Swan*, 27 Beav. 508.



with *Drummond v. The Duke of St Albans*, which I will notice separately, were cases relied upon by the defendant as instances of the Court not decreeing an account of rents and profits from any earlier period than the filing of the bill, or a period much more recent than the accruing of the title: I think, however, that they will all be found to have depended on special circumstances. In *Petticard v. Prescott*, (a) the facts, so far as they are necessary to be mentioned, were simple: Richard Astley gave a copyhold estate to Roger Petteward, and gave all the residue of his property to his brother John Astley; it was supposed, and I imagine correctly,

that there was some defect in the devise of the copyhold  
 \* 804 estate, so that the \* brother took possession of the copyhold estate as well as of the residue of the property; he held it during his life, and devised it by his will; subsequently a bill was filed by Petteward for the purpose of establishing an equitable title on the doctrine of election, and Sir W. GRANT held that the doctrine of election was applicable, and that Petteward was entitled to the estate although not legally devised to him, the brother being absolute devisee except for the copyhold estate and being bound to make his election. Sir W. GRANT, having in his judgment disposed of that point, goes on thus: (b) "With respect to the other point, there ought to be no account beyond the filing of the bill. There is no infant, no breach of trust, in the case." (From this I infer that if it had been the case of an infant, his Honor would have held he must have given an account for by-gone rents.) "John Astley lives and dies in the belief that no claim was to be made upon him." (He was not put to his election.) "Under that supposition he disposes. Upon that supposition those deriving under him deal with it, and after a lapse of time nearly sufficient to bar the legal remedy" (I think eighteen years had elapsed from the time of death to the institution of this proceeding), "if any there had been for the estate, this plaintiff asks, not only the estate, but the whole rents and profits from the time the title accrued, which he has been so tardy in asserting. Constructively, it is true, the heir was a trustee of the rents and profits of the estate bound by the will; but it does not follow that he is always so. In *Dormer v. Fortescue* (3 Atk. 124) Lord HARDWICKE says, upon special circumstances, even in case of a trust, the Court will

(a) 7 Ves. 541.

(b) Ib. 546.

restrain the account to the time of bringing the bill; and he specifies, as one instance, default and neglect in not filing the bill sooner; and says the Court has often thought \*fit \* 805 to restrain it. The plaintiff therefore ought in this case to be restrained from carrying the account farther back:" that is, Sir W. GRANT, admitting that the general principle was to follow the rule of law, and to give the account during the whole period of time, says that in the case before him there were circumstances within the exception laid down by Lord HARDWICKE, justifying him in not giving the account back to that remote period.

The next case in point of date was *Pickett v. Loggon*, (a) before Lord ELDON: there a bill was filed to set aside a sale that had been made by the plaintiff, on the ground of fraud and imposition: the parties were in very indigent circumstances, the sale took place in 1788, and the plaintiff's interest depended on a certain brother being dead, and it was a question whether he was dead; it was thus a transaction entered into in the dark: in 1792 it was ascertained that the brother had been dead, and consequently that the plaintiff's title was good: a bill was then filed to set aside the transaction, but I suppose in consequence of the parties not having good advice, or not having the means of proceeding, it was brought to a hearing and dismissed, no counsel appearing for the plaintiff, and the decree of dismissal enrolled: afterwards, in 1800, a new bill was filed, and Lord ELDON, having gone minutely into the case, and being of opinion that it was competent to the plaintiff to file the new bill notwithstanding the dismissal of the former suit, decided in favour of the plaintiff, and then, in three or four words at the end of his judgment, said he was disposed to think that the account should be only from the time of the bill filed. Although the expression is in that doubtful form, I have no doubt that the decree was drawn up accordingly, and that the case may be taken \* as an authority, that, under the circumstances, \* 806 Lord ELDON thought there ought to be no account beyond the period of the filing of the bill.

The next case chronologically is that of *Bowes v. East London Water Works*. (b) There Mr. Bowes was tenant for life, with remainder to his first and other sons, of certain leaseholds the legal estate of which was in two trustees, and the trustees, having

(a) 14 Ves. 215.

(b) 3 Madd. 375, p. 383.

power during the minority of any tenant for life to lease the property, took on themselves to lease after the minority had expired: the tenant for life, supposing the leases to be good, acquiesced in them, although they were in truth not binding on him because they were in breach of trust: I think there were also some other objections to which it is not necessary to advert: the bill was filed to set aside these leases after an acquiescence in them for nine years; and Sir J. LEACH held that they were to be set aside as being granted not in pursuance of the power; and then he goes on in his judgment to observe: "It is said that the plaintiff, having received the rent for nine years, has precluded himself from equitable relief in respect of the leases, if he were otherwise entitled to it. If the plaintiff, when he succeeded to the property, had, with full knowledge of the imperfection of the leases, and in consideration of the defendants agreeing to continue tenants, consented to leave them undisturbed, that would have amounted, not to a confirmation of the lease, because he could not confirm for those who stood behind him, but to an agreement, by which I should have held him bound for his life, if the leases continued so long. But it is plain that this plaintiff, during the receipt of the rent, was wholly unaware of the imperfection of the leases.

\* 807 The plaintiff, however, ought to have looked \* into his rights; and as, by his negligence to obtain information with respect to them and to assert them, the lessees may have been led to expenditure on the premises, the benefit of which they will now lose, I shall not direct an account beyond the filing of the bill, nor shall I give the plaintiff costs." Thus this case also proceeds upon the ground that it was an exception, and that it did not come within the general rule: the plaintiff ought to have been more alive to his own interest: he had, by lying by, led parties to expect, or to act upon the notion, that they had the property, in the possession of which he all along might have disturbed them but did not do so, and thus he might have led them into an expenditure which they would not otherwise have incurred; and it was therefore unjust that they should have any account directed against them beyond the filing of the bill.

There is another case which occurred not long subsequently to the last: I allude to that of *Edwards v. Morgan*, (a) before Chief

(a) M'Clel. 541.

Baron ALEXANDER, and it will also be found to be an exception. There certain leaseholds, to which a Mrs. Gwen Jones was entitled absolutely, were on her second marriage with Thomas Thomas assigned to trustees to secure certain charges, and, subject to those charges, in trust for Thomas Thomas and Gwen Jones, and after the death of either then for the survivor: the marriage took effect, and the wife survived; she had three daughters, and by her will she gave the whole of the property to one of them, Margaret, who married Thomas Edwards: Mr. Edwards thinking (it does not exactly appear how or why) that he was not entitled, but that the other sisters were, and having entered on the property as the personal representative of his wife's mother, put the other parties into possession: he afterwards found that the property was \*his own (that is, it was his as representing his wife, who \* 808 was then dead), and under those circumstances he filed a bill for relief: there was some question whether there had or not been an election, but finally the plaintiff succeeded in establishing his title to the property: the Chief Baron, after deciding on that part of the case, thus proceeds: (a) "Then comes the question relating to the rents and profits; and I am of opinion that the plaintiff is entitled to the rents and profits from the time of filing the bill." The plaintiff's counsel here interposed with the observation, "From the time of demanding the estate:" and the Lord Chief Baron resumed, "You have no evidence of that time: only from the time of filing the bill; that is the justice of it, and I apprehend that to be the practice and the rule of the Court in such cases. It seems tolerably clear that, in cases of mere adverse possession, the Court does not grant an account of rents and profits, when it decrees rents and profits, except from the time of filing the bill. That certainly is much more favourable to a more extended claim than this case; because that this was an adverse possession is true, but it was an adverse possession produced by the act of the plaintiff giving up the estate." What the Chief Baron says is, that Edwards having himself put the defendants into possession, although this did not estop him from afterwards asserting and establishing his title against them, yet he was not entitled to an account of the rents during the time he had himself allowed them to be in possession; and, in confirmation of that, he refers to the case of *Pettiward v. Prescott*, (b) which I have

(a) M'Clel. 554.

(b) 7 Ves. 541.

already noticed. The proposition laid down by the Chief Baron is founded on extremely good sense; and here, too, the analogy of law holds, because an action cannot be brought for mesne profits against a party who is a mere tenant at will until notice to  
 \* 809 quit has been given and \*possession demanded: that, I suppose, is what the learned counsel for the plaintiff meant when he said, "from the time of demanding the estate." Thus, in the case of *Edwards v. Morgan*, as well as in the others to which I have adverted, the general principle was clearly recognized, and the account was limited to the short period of filing the bill, only on the ground that there were special circumstances excluding the application of the general rule.

Two other cases were referred to. One was *The Attorney-General v. The Corporation of Exeter*, (a) but I do not think it has any particular bearing on the present case: there a bill had been filed against certain trustees of a charity to account for charity funds, upon the ground that they had been erroneously applied, and the Court made a decree only from the time of filing the bill, because to have carried the account further back would have been unjust towards trustees who had not misapplied the funds in the sense of misappropriating them, but had merely applied them in a different course of charity from what they ought to have done: under these circumstances, Lord ELDON said that the course of the Court was not to visit trustees with by-gone rents, but only to make them account from the time when they were called upon to account, and the error was pointed out.

The only other case was one before the late Master of the Rolls, Lord LANGDALE, of *Clarke v. Yonge*. (b) One-half of the tithes of a parish belonged to the rector, and one-half to a portionist: the two titles became united in the same person, and in that state  
 of things the tithe commutation took place, and one gross  
 \* 810 sum was then \*allotted for the tithes: the title of the portionist and the title of the rector afterwards came to be severed, and the question was, whether this Court could not find the means of setting right the great injustice that would be done if there was no remedy in this Court, namely, that the rector would obtain the whole of the tithes, half of which belonged to the portionist: Lord LANGDALE held that there was jurisdiction to

(a) 2 Russ. 45.

(b) 5 Beav. 523.

set that right, and decreed accordingly ; but then he said, just on the same principle that operated on the mind of the Chief Baron in the case of *Edwards v. Morgan*, that he would not give any account of the by-gone tithes ; the plaintiff had created the embarrassment by putting the defendant in such a situation that he went on, very naturally, receiving the tithes until the plaintiff asserted his title : Lord LANGDALE took the strong course of not only giving the plaintiff no by-gone tithes and depriving him of the costs, but he actually made him pay the costs of the suit, because he observed, in effect, that the defendant might very properly refuse to give up what he had obtained until the plaintiff's right was established by a legal proceeding. I own I do not quite follow this latter view of the case ; further investigation might perhaps make it appear to me to be right, but I only refer to it to show the way in which Lord LANGDALE considered the matter.

If these were all the authorities, they would seem to me to be perfectly uniform. Lord HARDWICKE lays down the law distinctly in *Dormer v. Fortescue* ; (a) and every case that has been relied on, as showing that a different principle has been acted upon, has gone upon the ground that there were special circumstances that took it out of the general principle. There is, however, \* one which I have not yet noticed, of *Drummond v. The Duke of St. Albans*, (b) that has an aspect of considerable difficulty. In that case the proceeds of an office, that of registrar of this Court, were assigned to certain trustees for George Duke of St. Albans ; and on his death the person who was not the party really entitled was allowed by the trustees to take possession and to receive them, under the supposition that they went with the title ; they really belonged to the infant plaintiff, Mr. Drummond ; under these circumstances a bill was filed for an account, and to establish the title of the plaintiff : Lord LOUGHBOROUGH decreed an account, and the question then arose as to the period of time for which the plaintiff should have the account. In that case the rule was, I think, stated perfectly correctly, but the question is, whether it was applied rightly : I am not clear that it was not ; but if it was, the authority is inapplicable to the present case. What Lord LOUGHBOROUGH says is that there ought to be no account beyond that which the party would have had at law : that, I think, is un-

(a) 3 Atk. 124.

(b) 5 Ves. 483.

doubtedly correct, but the point is, from what time would the party be entitled to an account at law? would not he there have been entitled from the time his title accrued? there is no doubt that in the case now before us the party would at law have been so entitled. I confess that, unless there be some explanation which I do not quite see, I cannot think that the case of *Drummond v. The Duke of St. Albans* squares with the other authorities, and I think it cannot be considered as law: it is inconsistent with what was said by the learned Judges whose decisions I have noticed, and if I am to determine between the two, I must decide in favour of that long string of authorities, and against the authority of Lord

\* 812 LOUGHBOROUGH. I cannot understand \* how any limitation of the right of an infant can be introduced on the doctrine of laches. An infant files his bill, as in this case, within twelve months after he comes of age; and what then is there to prevent him from having the same right in equity as he would have had at law? namely, an account of the rents and profits during the whole period that his title has accrued.

I arrive at this conclusion against my own wishes (if a Judge can have wishes upon a case), because undoubtedly one feels it is a hard case, there being no fraud connected with it; but we must merely look at what are the rights of the parties. The defendant held the estate with full notice on the title-deeds that it was the estate of the infant; and having done so, he must abide the consequences, and account for the rents and profits during the period that he has so held.

I have had an intimation from the Lord Justice KNIGHT BRUCE, (a) and am authorized to say that he takes the same view of the matter.

THE LORD JUSTICE TURNER. — The sole question reserved for judgment in this case was whether the account of rents, which has been carried back to the year 1831, when the plaintiff's title accrued, ought to have been limited to any less remote period. It was insisted by the defendant that it ought not to have been carried back beyond the filing of the bill, or at all events for more than six years before that date, and many cases were cited in support of the position that the former of these limits ought to have been

(a) His Lordship was absent from indisposition.

adopted under the circumstances of the present case. I  
 \* have carefully examined the cases which were referred to, \* 813  
 and many others bearing upon this question, and I think that  
 they may fairly be said to establish this general position, — that  
 in cases of adverse possession, where there is no trust, no infancy,  
 no fraud, no suppression, where in short there is a mere *bonâ fide*  
 adverse possession, it is not according to the course of the Court  
 to carry back the account of rents beyond the filing of the bill.  
 The general rule is so laid down by Lord ELDON in *Pulteney v.*  
*Warren*, (a) and by Lord Chief Baron ALEXANDER in *Edwards v.*  
*Morgan*. (b) The rule, therefore, admits of no doubt, and it is  
 important only, with reference to the present case, to observe the  
 reason on which it is founded. Lord ELDON thus states the reason:  
 “It is the party’s own fault that he did not file the bill sooner;”  
 and the cases which furnish us with instances of the exceptions to  
 the rule lead to the same conclusion as to the foundation on which  
 it rests. Thus, as was remarked by Sir W. GRANT in *Pettiward*  
*v. Prescott*, (c) Lord HARDWICKE, in *Dormer v. Fortescue*, (d)  
 states the case of trust as one in which the account will be carried  
 back, but at the same time adds, that even in such a case it will,  
 under special circumstances, be limited to the time of filing the  
 bill, and specifies default or laches in the plaintiff as one of the  
 instances in which it will be so limited; and in *Pettiward v. Pres-*  
*cott* itself, a case of constructive trust, the account was limited to  
 the time of the bill being filed, upon the very ground of delay.

In *Forder v. Wade* (e) too, another case of equitable title,  
 the account was limited to the time of filing the \* bill, as \* 814  
 I have no doubt upon the ground of delay, although the  
 marginal note refers to the doubt upon the title as the reason of  
 the limit. So, again, cases of fraud and suppression furnish ex-  
 ceptions to the general rule, as was laid down in *The Duke of*  
*Bolton v. Deane*, (g) *Bennett v. Whitehead*, (h) *Dormer v. For-*  
*tescue*, (d) and *Townsend v. Ash*; (i) but in *Pickett v. Loggan*, (k)  
 a case of fraud, the account was directed only from the time of  
 the bill being filed, upon the ground of the delay in proceeding.

(a) 6 Ves. 93.

(b) M’Clel. 541.

(c) 7 Ves. 541.

(d) 3 Atk. 129.

(e) 4 Bro. C. C. 521.

(g) Prec. Ch. 516.

(h) 2 P. W. 645.

(i) 3 Atk. 337.

(k) 14 Ves. 215.



It appears, therefore, that both the general rule and the exceptions to the rule are governed by the same principle. In the one case the delay is the foundation of the rule ; in the other it puts a limit upon the exception. It is to be considered, then, how the question stands in the case before us, in which the plaintiff was an infant when his title accrued, and there is no ground for imputing delay since he attained twenty-one. That infancy takes cases out of the general rule admits, I think, of no doubt. It is so laid down in *The Duke of Bolton v. Deane*, in *Dormer v. Fortescue*, and in *Petteward v. Prescott*, and the question therefore is, whether in cases of infancy, where there has been no delay after the infant has attained twenty-one, the exception ought to be limited so as to cut down the account to the time of the bill being filed. Upon principle I think that such a limit could not be maintained, for the delay which is the foundation of the limit in other cases cannot be imputed to infants. The rights of infants ought not to be prejudiced by the neglect of others to assert them. It was said,

however, that the case of *Drummond v. The Duke of St. Albans* (a) warranted the imposition of such a \* limit ; but that case does not appear to me to govern the present.

In that case the name of the duke with whom the question arose, had, as I presume, been inserted in the grant without his knowledge, and the grant had passed to the mortgagee. It was a case, therefore, in which there was infancy on the one side, and a perfectly *bonâ fide* adverse possession on the other ; but without meaning to cast any imputation whatever upon this defendant, I think that his possession cannot be said to have been perfectly *bonâ fide*. *Bonâ fide* possession is thus defined by Lord HARDWICKE in *Dormer v. Fortescue* : " Where a man shall be said to be *bonâ fide* possessed, is where the person possessing is ignorant of all the facts and circumstances relating to his adversary's title, which could not be here, as Fortescue had all the deeds, and the very settlement on which the title depends : " and applying this test, I think that the possession of this defendant cannot be said to have been a *bonâ fide* possession. I am of opinion, therefore, that admitting the case of *Drummond v. The Duke of St. Albans* to be good law, this case is distinguishable from it, and the account could not in this case have been properly confined to the period of the bill being filed.

(a) 5 Ves. 493.

It is unnecessary in this view of the case to give any opinion upon the decision in *Drummond v. The Duke of St. Albans*, but I confess that I feel great difficulty upon it. According to the law of this Court, whoever enters upon the estate of an infant, is held to have entered as bailiff or guardian. *Morgan v. Morgan*, (a) *Dormer v. Fortescue*; and this rule has been carried so far as that even in a case where an adverse judgment had been recovered against an infant at law upon a purely legal title, this Court entertained a bill by the infant to get \* back the \* 816 estate, and sent the question to be again tried at law.

*Lord Newburgh v. Bickerstaff*. (b) It is to this rule Lord HARDWICKE refers in *Dormer v. Fortescue* as the ground of the account being carried back in cases of infancy. The subsistence of the relation thus created by the entry seems to draw with it the right to the back account, and if the relation is to be held to have subsisted where there has been possession under an adverse judgment recovered at law, I think it difficult to say that it ought not to have been held to have subsisted where the possession was taken by mistake.

The remaining question in this case is, whether the account ought to have been limited to the period of six years before the filing of the bill. It was contended, on the part of the defendant, that this limit ought to have been imposed with reference to the provisions of the statutes of limitation, but it does not appear to me that this case can be brought within the range of any of those statutes. According to the construction put, and, as I think, rightly put, by the Court of Exchequer in *Grant v. Ellis*, (c) upon the Statute 3 & 4 Will. 4, c. 27, this is clearly not a suit for the recovery of rent within the meaning of the earlier sections of that statute; nor can it, as I think, be considered as a suit for the recovery of arrears of rent within the meaning of the forty-second section of the same statute. It is indeed no more than a suit by an infant, upon attaining twenty-one, against his guardian for an account; and the provisions of the above-mentioned statute do not appear to me at all to affect such a suit. If any statute of limitations could be brought to bear upon the case, I think it would be the statute of James, by analogy to the action of account referred to in that statute. There is, indeed, authority

(a) 1 Atk. 489.

(b) 1 Vern. 295.

(c) 9 M. &amp; W. 113.

\* 817 \* for this in *Lockey v. Lockey*, (a) where the statute was held to be a bar to such a suit as the present, brought more than six years after the infant had attained twenty-one; but unfortunately this analogy will not assist the defendant's case, for the statute of James saves the case of infancy.

I am of opinion, therefore, that this decree must stand as to the account as well as in other respects.

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### BOYSE v. ROSSBOROUGH.

1854. January 18, 19, 25. February 11. Before the Lord Chancellor Lord CRANWORTH and the LORDS JUSTICES.

A mere legal devisee may file a bill against the heir-at-law of the testator for the purpose of having the will established against him, though no trusts are declared by the will, and though it is not necessary to administer the estate under the direction or decrees of a Court of Equity.<sup>1</sup>

THIS was an appeal by Mary Grey Wentworth Rossborough and her husband, two of the defendants in the suit, against an order

(a) Prec. Ch. 518.

<sup>1</sup> See 2 Story Eq. Jur. § 1449 a; *Colclough v. Boyse*, 6 H. L. Cas. 1; *Kay*, 71; *Boyse v. Rossborough*, 6 H. L. Cas. 2. In Massachusetts and many other States, the Courts of Probate have complete jurisdiction over the probate of wills, both of real and of personal estate, and their decrees are conclusive upon all parties, and not re-examinable in any other Court. *Tompkins v. Tompkins*, 1 Story, 547; *Osgood v. Breed*, 12 Mass. 525, 533, 534; *Laughton v. Atkins*, 1 Pick. 535, 547, 548, 549; *Bush v. Sheldon*, 1 Day, 170; *Brown v. Lannan*, 1 Conn. 476; *Poplin v. Hawke*, 8 N. H. 124, *Bailey v. Bailey*, 8 Ohio, 289; 1 *Jarman Wills* (4th Am. ed.), 220, and notes and cases cited; *Parker v. Parker*, 11 Cush. 519; *Fortune v. Buck*, 23 Conn. 1; *Potter v. Webb*, 2 Greenl. 257; *Small v. Small*, 4 Greenl. 220, 225; *Patten v. Tallman*, 27 Maine, 17; *Ex parte Fuller*, 2 Story, 327-329; *Lewis v. Lewis*, 5 Louis. 388, 393, 394; 1 *Dan. Ch. Pr.* (4th Am. ed.) 874-877. The Ecclesiastical Courts in England had no jurisdiction to determine the validity of wills of real estate; but the Court of Probate has such jurisdiction conferred upon it: 20 & 21 Vict. c. 77, §§ 61-65; and when probate of a will, not confined to personalty, has been granted in solemn form, the probate is conclusive evidence, in all the Courts, of the validity of the will as to real, as well as to personal estate: 20 & 21 Vict. c. 77, § 12. The consequence of the change in the law effected by the above Act, is, that the practice of establishing a will in Chancery is of comparatively rare occurrence. 1 *Dan. Ch. Pr.* (4th Am. ed.) 877.

of Vice-Chancellor Wood overruling a demurrer to the plaintiff's bill.

The bill was filed by Jane Stratford Boyse and her husband J. S. Boyse, the former being devisee in fee of the real estate of Cæsar Colclough under his will, and it prayed that the will might be established. The present appellants, M. G. W. Rossborough and her husband, the former of whom was the heiress-at-law of the testator, put in a general demurrer for want of equity, the principal ground taken being that a bill would not lie in the Court of Chancery for the purpose of establishing the will of a testator at the instance of a mere legal devisee of an estate, where no equitable relief was prayed, or the administration of the estate sought. The Vice-Chancellor, before whom the question came in November and December, 1853, overruled the demurrer, \* and the demurring defendants appealed. A full report \* 818 of the facts of the case, together with the arguments of counsel and the judgment of the Vice-Chancellor, will be found in the first volume of Mr. Kay's Reports, page 71.

Other questions independent of the one already mentioned were suggested in argument; (a) they are not noticed in the following report, as it will be seen that the judgment of the Court is confined expressly to the point whether there was jurisdiction to establish a will against the heir-at-law at the suit of a mere legal devisee, such devisee having no equitable title or interest in the property under the will.

*Mr. Swanston*, for the demurrer, and in support of the appeal. — The sole question here is, whether a mere legal devisee can file a bill in this Court to establish a will. Where there are two parties claiming only a legal title, the title of one of them depending upon the validity of a testamentary instrument, this Court will not determine the question of validity; all it will do is to give its aid by perpetuating the testimony of witnesses, and this is the extent of the relief to which the plaintiff is entitled. *Mit. Pl.* pp. 41, 120, 121, ed. 3; pp. 51, 148, 149, ed. 4. [He referred to *Fearne's Posth. Works*, p. 234, and to the cases of *Lord Dursley v. Fitzhardinge Berkeley*, (b) *Allan v. Allan*, (c) *Bidulph v. Bidulph*, (d) and

(a) They will be found mentioned in Mr. Kay's Report.

(b) 6 Ves. 251.

(c) 15 Ves. 130.

(d) 2 P. W. 285.

*Foulds v. Midgley*, (a) as supporting this proposition.] The  
 \* 819 Vice-Chancellor was of opinion that if a bill \* like this can  
 be filed by a legal devisee in trust, which we do not dispute,  
 the same course must be open to the legal devisee without a trust;  
 but it is submitted that the cases are quite distinguishable. No  
 mention is made of such a bill as the present by Lord REDESDALE:  
 in *Devonsher v. Newenham* (b) his Lordship evidently treats the  
 right of a devisee in trust to the protection of the Court as arising  
 by virtue of the trust; and in Mit. Pl. p. 139, ed. 3 (p. 171, ed. 4),  
 there is the following passage: "To a bill to carry into execution  
 the trusts of a will disposing of real estate by sale or charge of  
 the estate, the heir-at-law of the testator is deemed a necessary  
 party, that the title may be quieted against his demand; for which  
 purpose the bill usually prays that the will may be established  
 against him by the decree of the Court:" here Lord REDESDALE  
 in effect says, that the devise being in trust gives the equity.  
 In *Lord Fingal v. Blake*, (c) Lord Chancellor HART alludes to  
 the same principle. He says: "It is quite true that executors,  
 where the will contains a charge of debts, acquire thereby no  
 right to come into equity to establish the will against the heir;  
 . . . but in this case I think the plaintiffs take a direct interest  
 in the real estate, Lord Fingal, who is one of the executors, being  
 likewise a trustee; and though, as executor, he has no right to  
 call for a decision touching the devise, as trustee he is clearly  
 entitled. . . . I think if there was no trust this Court would  
 have no ground to interfere; . . . but where there is a trust  
 the whole question comes properly within the jurisdiction and  
 under the control of this Court," &c. The case of *Berney*  
 \* 820 v. *Eyre* (d) was referred to in the Court \* below by the  
 plaintiffs, but it will be found that there the bill was only  
 to perpetuate testimony; and *Harris v. Ingledew*, (e) which they  
 also cited, is really in favour of the present argument, for there  
 the Court had possession of the case to administer the trusts. It  
 was said that Lord ELDON, in *Bootle v. Blundell*, (g) spoke of "an  
 establishing bill" as if it was a class of bill well known and  
 recognized, but this did not show that the function of such a bill  
 was confined to establish the will; it was also to execute trusts:

(a) 1 V. &amp; B. 138.

(d) 3 Atk. 387.

(b) 2 Sch. &amp; Lef. 199.

(e) 3 P. W. 91.

(c) 1 Moll. 113, p. 115.

(g) 19 Ves. 494.

the same remark applies to *Morrison v. Arnold*, (a) and to *Colton v. Wilson*. (b) If a bill like the present will lie at the instance of the devisee, there will be no reciprocity for the heir-at-law in possession. *Pemberton v. Pemberton*, (c) *Jones v. Jones*, (d) *Mackrell v. Hunt*. (e) The plaintiffs relied below on *Grove v. Young*, (g) the bill in which was filed under the direction of the Lord Chancellor (Lord COTTENHAM) given in *Grove v. Bastard*; (h) but all that his Lordship meant was, that the proper bill should be filed to try the validity of the will, and although the bill which was in consequence filed did not ask that the trusts should be performed, yet that could not be relied on as a precedent; for the heir took no objection, being willing to try the validity of the will in this form, and as a matter of fact the devise was itself upon trust. [He referred to the terms of the decree to establish a will, Seton on Decrees, p. 82, to the 31st Order of the 26th August, 1841, and to *French v. Baron*, (i) *Binfield v. Lambert*, (k) *Cator v. Butler*, (l) *Wood v. Stane*, (m) \* *Talbot v. The Earl of Radnor*, (n) *Tatham v. Wright*, (o) \* 821 *Blake v. Foster*. (p)]

*Mr. E. Younge*, on the same side. — He commented shortly on the grounds upon which the Vice-Chancellor's judgment proceeded, and read the following passage from the 4th Report of the Commissioners of the Law of Real Property, p. 35: "Courts of Equity, for the most part, decline to determine the validity of a will without the aid of a Court of Law, which they consider to have the proper jurisdiction on this subject. When wills of freehold estate come incidentally in question in Courts of Equity, they are considered, with respect to proof, as on the same footing with deeds; but when a will of freehold estate is the direct subject of suit, Courts of Equity have assumed jurisdiction in some cases, with respect to such wills, differing from the rules of common law. When the estate devised is an equitable estate, or is liable to the

(a) 19 Ves. 670.

(b) 3 P. W. 190.

(c) 13 Ves. 290.

(d) 3 Mer. 161.

(e) 2 Madd. 34 n.

(g) 5 De G. & S. 38.

(h) 2 Phil. 619.

(i) Dick. 138.

(k) Dick. 337.

(l) Dick. 438.

(m) 8 Price, 613.

(n) 3 M. & K. 252.

(o) 2 Russ. & M. 1.

(p) 2 Ball & Beat. 387.

payment of debts or legacies, or to any trusts created by the will, and in cases where, on other grounds, Courts of Equity have jurisdiction, they will decree that the will has been well proved and is to be established." [He referred to Story's Commentaries on Equity Jurisprudence, § 1447 and notes (Vol. II. p. 939 *et seq.*, ed. 6), and produced an extract of *Mackrell v. Hunt* from the Registrar's Book. (a)]

[THE LORD JUSTICE KNIGHT BRUCE. — We find a useful jurisdiction exercised in many instances, and it is now said it is to  
\* 822 be limited by the extent of the example; \* but what I want to know is what is the distinction between the case of a will containing a trust, and a will not containing a trust, the heir in each case saying that the instrument is a nullity.]

*Mr. J. V. Prior*, on the same side, referred to and commented on *Berney v. Eyre*, (b) and the other cases before cited.

[The Lord Justice TURNER mentioned *Grayson v. Atkinson* (c) before Lord HARDWICKE in 1752, and read the particulars of the case from the Registrar's Book.]

*The Solicitor-General*, for the plaintiffs and in support of the decision of the Vice-Chancellor. — When the true facts of the case of *Mackrell v. Hunt* (d) are looked into, it will be found to have no bearing on the point under discussion: the plaintiff in the suit there was merely a party who had entered into a contract for the purchase of an interest devised in a will, and it was held he had not such an interest as enabled him to file a bill to establish the will. Upon the question of principle, little can be added to what is adduced by the Vice-Chancellor in his judgment. It is admitted by the plaintiffs that the Court has jurisdiction to establish a will when that is incidental to something else sought by the bill; and it is impossible to maintain that the jurisdiction of the Court depends on the fact of the will containing a trust; it is limiting the rule by its example, and making a universal affirmation equal to a negative proposition. Whatever be the origin of the jurisdiction,

(a) The substance of this will be found referred to in the judgment of the Lord Chancellor.

(b) 3 Atk. 387.

(c) 2 Ves. 454.

(d) 2 Madd. 34, n.

the cases are unintelligible except upon the supposition that the jurisdiction of the Court goes to the \*extent for \*823 which the plaintiffs contend. [He cited *Angell v. Angell*. (a)]

*Mr. Cairns* (*Mr. Rolt*, who was also for the plaintiffs, being absent) followed on the same side. — He observed that the plaintiffs adopted the arguments used by the Vice-Chancellor in his judgment; and that none of the cases cited supported the distinction on which the demurring parties relied. In *Barney v. Eyre* (b) it was clear, from the record, which had been searched, that the will contained no trust; the same was the case in *Grayson v. Atkinson* (c) and *Blake v. Foster*; (d) Lord ELDON also in *Bootle v. Blundell* (e) spoke generally of “an establishing bill” as a species of bill well understood. The Orders of August, 1841, to which reference had been made, had really no bearing on the case. [He commented on the cases of *Tatham v. Wright*, (g) *Grove v. Bastard*, (h) *Lewis v. Nangle*, (i) *Devonsher v. Newenham*, (k) *Lord Fingal v. Blake*, (l) *Mackrell v. Hunt*; (m) and read a note given by *Mr. Monro* of a case of *Gurdon v. Tomlinson*, (n) where it was stated that upon a full and deliberate hearing of the cause, touching the validity of the will of one Thomas Tasker, it appeared that there was no proof to induce the Court to judge that the said will was a good will.]

*Mr. Swanston* replied. — He relied on the case of *Sheffield v. The Duchess of Buckinghamshire*, (o) as an instance of a trust giving \*the Court a jurisdiction, which but for the \*824 trust it would not have exercised. He contended that the argument on the other side assumed that there was a gross omission in Lord REDESDALE’S book, which evidently confined bills to establish wills to cases where the devisee had a trust to perform; that a Court of Equity will not assume the decision of a mere

(a) 1 S. & S. 83.

(b) 3 Atk. 387.

(c) 2 Ves. 454.

(d) 2 Ball & Beat. 387.

(e) 19 Ves. 494.

(g) 2 Russ. & M. 1.

(n) 22 October, Reg. Lib. A. 1607, fo. 120.

(o) 1 Atk. 628.

(h) 2 Phil. 619.

(i) 2 Ves. 431.

(k) 2 Sch. & Lef. 199.

(l) 1 Moll. 113.

(m) 2 Madd. 34 n.



legal question, *Simpson v. Lord Howden*; (a) that it was impossible to reconcile the practice of legal devisees filing bills to perpetuate testimony with the existence of a right in a legal devisee to file a bill to establish, and that the answer given to this by reference to *Angell v. Angell*, (b) was quite unsatisfactory. He commented on the cases referred to on the other side, and relied, as express authorities in support of his own argument, on *Mackrell v. Hunt*, (c) and on *Strickland v. Strickland*. (d) He rested his case, first, on the absence of any precedent of a bill by a legal devisee to establish a will; secondly, on the existence of numerous precedents of bills to establish wills as incident to the execution of trusts under them; thirdly, on the frequent precedents of bills by legal devisees to perpetuate testimony; fourthly, on direct authorities in favour of the argument in support of the demurrer; and, fifthly, on the absence of any authority against it.

*The Solicitor-General*, in reference to *Strickland v. Strickland*, (d) said, that the discussion there was not between the devisee and heir, and that the point now in question was never at all touched upon.

February 11.

\* 825 \* THE LORD CHANCELLOR. — The question in this case, which is raised on a demurrer to the plaintiffs' bill, is whether the legal devisee of real estate, devised to him not upon trust, but for his own benefit, can file a bill against the heir praying to have the will established: the Vice-Chancellor Sir W. PAGE WOOD, overruling the demurrer, decided in favour of such a bill, and the propriety of that decision is disputed on the present appeal. Certain minor grounds were also relied on in support of the bill, but as we have come to the same conclusion as the Vice-Chancellor did upon the main point, it becomes unnecessary to discuss them; and I shall, therefore, assume that the question I have stated is the only one which we have to determine.

I may begin by saying that the Vice-Chancellor went so fully into the authorities, and commented upon them with so much ability, that I was at one time disposed to do no more than state

(a) 3 M. & C. 97.

(b) 1 S. & S. 83.

(c) 2 Madd. 34 n.

(d) 6 Beav. 77. Affirmed by Lord COTTENHAM, January, 1848, not reported.

my entire agreement with the view taken by his Honor ; but fearing lest, if I adopted that course, it might be thought that the subject had not received from me the full attention which it deserves, I have deemed it necessary shortly to state the grounds on which I arrive at the same conclusion with the Vice-Chancellor.

*Prima facie* an heir-at-law may, like any other person, choose his own time for asserting his title ; and, therefore, when any one contends that he has a right to say to the heir that he must assert his title now or never assert it, the *onus* of proof rests on the party so contending ; and the question in the present case is, whether the plaintiffs have established that a legal devisee, not on trust, has on principle or authority such a right. No general principle can be said to exist enabling a person at all

\* times to insist that every one who has or may have an \* 826 adverse claim against him shall assert that claim at any particular time. A case was referred to during the argument, by the Lord Justice Sir G. TURNER, of *Baker v. Shelbury*, (a) where an apprentice, after his time was out, filed a bill against his master to compel him to sue him, on covenants alleged to have been broken, then or not at all, and the Court sustained the bill. Whether it might or not have been useful to have adopted a rule of that kind as a universal principle, I need not stop to inquire ; but I do not find that it has been acted upon generally. There is, however, a class of cases in which it has been acted upon ; I mean that very common one of bills filed to establish wills, and to have the trusts carried into execution. There a party files a bill to compel the heir-at-law to assert his right at the time at which it is convenient for the plaintiff that it shall be asserted, instead of leaving it to the heir to assert it at the time he shall choose for himself. I confess that I cannot satisfy myself as to what has been the origin of this jurisdiction. The Vice-Chancellor seems to think that in all probability it arose from the circumstance that originally devises were declarations of uses, and as such cognizable only in this court ; but I am not satisfied that it might not be on a different principle ; namely this, that there being with respect to personal estate from the earliest times a mode of forcing a party who asserted or might assert that a deceased person had died

(a) 1 Cases in Chancery, 70.

intestate to litigate that question of testacy or intestacy and to have it decided at once, it might have been found convenient to adopt the same course with respect to real estate.

Putting aside, however, this mere antiquarian view of  
\* 827 \* the question, the real point is, whether the cases to which

I have referred do or do not govern the present. The defendants, who have demurred, say that they do not, because the ground of the Court's interference in the case of a devise upon trusts is the necessity of establishing the will in order to enable the Court safely to execute the trusts, and in the present case there is no trust. I confess that appears to me a most unsatisfactory distinction, because the legal right which is interfered with is that of the heir, who is an entire stranger to the trusts. The grievance to him, if it be a grievance, is that he is compelled to litigate not at the time he thinks fit, and the nature of the interest of the opposing party is to him perfectly immaterial. A will may contain a devise upon trust, and also a legal beneficial devise to the same person. In such a case the title of the devisee to have the will established could not be controverted, and by the decree the whole will would be established, both as to the property in trust, and as to that not in trust. Thus a will might be established in favour of a legal devisee, if there was any devise to him on trusts; but it seems to my mind absurd that the right to establish the will in respect of the interest of a legal devisee should depend on there being another devise to him upon trusts. In the case of an alleged devise on trusts, the assertion of the claimant is that the deceased has by his will given him the estate in question subject to the discharge of certain duties; if there are no trusts, his assertion is that the deceased has given him an estate for his own benefit absolutely. In this respect the two claims differ, but the proposition of the heir is in both cases precisely the same: he denies that the deceased has given the estate at all. If it is established that in the first case the heir may be called upon to litigate the adverse right at the wish of the party asserting it, the consequence must be that the same privilege  
\* 828 \* exists in the second case also. The objection is that such a bill is an interference with the adverse right of the heir, but as this interference is not a valid objection in the one case, I do not see how it can be so in the other; to the heir the two cases are identical.

It was said, however, that, whatever may be the theory on the subject, the authorities are opposed to a bill like that now in question; that there is no precedent for it, and that the precedents are against it. This brings me to consider what the authorities are, and how far they really bear on the case; for I admit that, although principle might seem to me to be in favour of such a bill, yet, if authority went the other way, this is just one of those cases in which I should bow to authority. Assuming then, for the present, that there is no direct authority on the question (whether there is or not I will consider hereafter), authorities of a negative character have been relied on in favour of the defendants. In the first place it is said that Lord REDESDALE, in his book upon pleading, when speaking of the different sorts of bills, mentions bills to perpetuate testimony, and bills to establish and carry into execution the trusts of a will of real estate, but that he makes no mention of bills merely to establish. That, no doubt, is so; but I conceive it may be explained by the fact that bills to establish and carry trusts into execution constitute so very large a portion of bills to establish, that he mentions a bill of that description as an illustration of the class. The passage is (p. 171, ed. 4): "To a bill to carry into execution the trusts of a will disposing of real estate by sale or charge of the estate, the heir-at-law of the testator is deemed a necessary party, that the title may be quieted against his demand; for which purpose the bill usually prays that the will may be established against him by the decree of the Court; but \* if the testator has made a prior will con- \* 829 taining a different disposition of the same property, and which remains uncanceled, and has not been revoked except by the subsequent will, it has not been deemed necessary to make the persons claiming under the prior will parties; though if the subsequent will be not valid, those persons may disturb the title under it as well as the heir of the testator. If, however, the prior will is insisted upon as an effective instrument notwithstanding the subsequent will, the persons claiming under it may be brought before the Court, to quiet the title, and protect those who may act under the orders of the Court in executing the latter instrument:" he then says, that if there is no heir-at-law, the Attorney General may be made a party, and if the heir is abroad, although the Court may not decree or declare the will well proved against the heir, it will execute the trusts. Lord REDESDALE was showing that a

Court of Equity requires all persons interested to be parties to a suit; he was also explaining the nature, extent, and qualifications of the rule; and it is as connected with this subject that the passage which I have read, and which is relied upon, occurs. It does not, however, appear to me necessarily, or even naturally, to imply that the existence of the trust is a condition without which the Court could not establish the will: it may well imply that, whereas all parties acting under a will may either rely on the will as on any other instrument and at once act on it, or may in the first instance establish it conclusively as probate does in respect of personal estate, the rule of the Court is never to act on the will without first establishing it, unless there are special reasons for so doing: and I cannot help thinking that, if Lord REDESDALE had understood the existence of a trust to be a condition precedent to the right of establishing the will, he would have enunciated that as a distinct proposition, and not have left it to mere

\* 830 inference. \* Then the case of *Devonsher v. Newenham*, (a)

before Lord REDESDALE in Ireland, was cited as confirmatory of the view supposed to be fairly deducible from the passage in the treatise. I have attentively considered that case, but I cannot think that it bears out the proposition contended for. There a bill had been filed to establish and carry into execution the trusts of a will of real estate, and one of the defendants demurred on the ground that he had no interest and ought not to have been made a party under the following circumstances: the testator had been tenant in tail, but he suffered a recovery which barred the entail unless there was some defect in the recovery, and devised the estate, and the bill was filed by the parties claiming under the devise, one of them, and the principal party interested, being the heir in tail of the testator, who was entitled *quâcunque viâ*, for he was heir in tail if there was no valid recovery suffered, or he was devisee if there was a valid recovery: in filing a bill, however, to establish and carry into execution the trusts of the will, the parties made a co-defendant the person who would have been entitled as tenant in tail in remainder in case the recovery was not well suffered, but Lord REDESDALE held that he could not be called on to answer: in the first place there was no suggestion on the bill of any reason why the recovery suffered was not a valid

(a) 2 Sch. & Lef. 190.

recovery, and Lord REDESDALE alludes to this, saying that a mere allegation that a common recovery cannot bar an estate tail, and that Taltarum's case and the other cases have been wrongly decided, would not give the Court a right to interfere; in fact, there was no tenancy in tail in existence, for it had been barred. The case, it is true, is one of a bill filed to establish and carry into execution the trusts of a will; it is therefore no authority that such a\* bill may be filed if there are no trusts: this is \* 831 the most that can be said, but in fact it leaves the present question entirely untouched. A number of authorities were also cited from Dickens' Reports, which I confess appear to me to have but little bearing on the case; they go to show under what circumstances the Court will proceed to execute the trusts of a will without the presence of the heir-at-law, a well-known exception being that if the heir-at-law cannot be found the Court will still execute the trusts, although in his absence he cannot be bound.

I will now advert to the next argument which was adduced. It was said that a strong inference may be drawn from the fact of the numerous cases of bills merely to perpetuate testimony, that such bills never would have been filed if parties might at once have filed bills to establish, and that hence had arisen the common expression of "a will proved in Chancery." That argument struck me as being entitled to very considerable weight, and I do not know that I can show quite satisfactorily to my own mind why it is that parties have had recourse to bills to perpetuate testimony when they might have had bills to establish wills; but I think that one reason might be that it was an infinitely less expensive mode of proceeding, as the plaintiff had not to incur the cost of bringing his suit to a hearing. I may here remark, that when in old authorities of a century and a half ago reference is made to "bills for proving a will in Chancery," this is not always to be understood as meaning bills to perpetuate testimony: it is quite clear that that expression was used in a very vague sense, and often meant what I consider to be bills such as that now under discussion. This occurs in a case referred to in the argument of *Colton v. Wilson*, (a) before Lord KING \* in the year 1733: it \* 832 was a bill to compel the completion of a purchase made from the trustees of a will; the defendant insisted that the title

was defective, the will not having been proved against the heir, who was abroad: the statement is: "The will was proved in this Court to be duly executed; but the heir, who was beyond sea, in the East India Company's service, though made a party defendant, yet had not appeared to or answered the bill; and the defendant Wilson, though he was at first willing to purchase the premises, and had entered on good part thereof; yet other part of this estate, on which he had not entered, being much out of repair, the tenants racked, and the rents likely to fall, he was now desirous of being discharged from his purchase: and it was on his behalf insisted that this being the case of a will not proved in equity against the heir, it was a defective title." The reporter is there speaking of a will proved in equity as a will in respect of which there had been, not a bill filed to perpetuate testimony, but a bill in which there had been a decree establishing the will; and then he goes on to show why it was contended that the purchaser ought not to be compelled to complete his purchase; but the Lord Chancellor says, "It is very proper that a will disposing of lands should be proved in equity, especially in the case of a modern will." It is quite clear that neither the reporter in his report of the argument, nor the Lord Chancellor in his judgment, are speaking of a bill to perpetuate testimony of witnesses; they are speaking of a will proved in Chancery as a will established by the decree of the Court of Chancery. In confirmation of this I may observe, that nothing is more common in old cases, and in books of the highest authority, than to see it stated that in order to dispense with the heir-at-law concurring in the conveyance by a devisee, it is useful and proper to have the will proved in Chancery, and I cannot

\* 833 think that it is to be assumed \* that in this statement bills to perpetuate testimony were meant. Such a proceeding might or might not render it safe to dispense with the concurrence of the heir-at-law: if the witnesses were honest and to be relied on, it might be an advantage, but it would not necessarily render the concurrence of the heir-at-law unnecessary. That could only be effected by preventing him from afterwards disputing the will, and that would be through the means of a bill to establish the will. When, therefore, such frequent mention is made of the proposition that a purchaser ought to have, particularly in the case of a recent will, the concurrence of the heir, or to have the will proved in Chancery, I believe what is there referred to is, not

what Blackstone and other writers say is usually meant by proving a will in Chancery, namely, a bill to perpetuate testimony, but a decree establishing the will against the heir-at-law so as to prevent him from afterwards disputing it. Whether, however, that be the correct view of the cases or not, I have certainly come to this conclusion, that the circumstance of there being a particular proceeding which may be and has been often resorted to (not being the proceeding now in question or equally beneficial with it) is not a sufficient argument to weigh against the fact that proceedings to establish wills have been very common when there are trusts, and that there is no real distinction between the case of there being trusts and of there being none.

It has been stated that there are no authorities in favour of such a proposition as that now contended for by the plaintiffs. That perhaps may be so (putting the very recent cases out of the question), to the extent that there is no case in which the point has been discussed and decided; but I think there is a great deal of authority from which a decision may be inferred. In the first \*place there is the case of *Colton v. Wilson*, (a) to \*834 which I have already referred. It is true that there the will contained trusts, but the Lord Chancellor does not appear to have adverted to that circumstance as being material, and seems to have founded his judgment upon considerations which would naturally give the go-by to any such question. There is also the case of *Berney v. Eyre*, (b) the note of which is very short, in which Lord HARDWICKE lays down the following general rules: "If a devisee brings a bill merely in *perpetuam rei memoriam*, and the heir-at-law does nothing more than cross-examine the witnesses, who are produced to confirm the will, he is entitled to his costs. If he examines witnesses to encounter the will, then he shall not have his costs. This is, where the bill does not pray relief, or is not brought to a hearing." The bill here referred to as not brought to a hearing, is a bill in *perpetuam rei memoriam*, and, therefore, Lord HARDWICKE clearly considers that such a bill may be brought to a hearing; and I infer from this that he thought that a man might either file a bill merely to perpetuate testimony, and then certain consequences would follow about costs, or he might bring such a bill, that is, a bill which has no other object than to estab-

(a) 3 P. W. 190.

(b) 3 Atk. 387.



lish the will *in perpetuum rei memoriam* by decree, to a hearing, and that then there would be a different rule as to the costs, the heir-at-law having then certain rights upon which he might insist, because he was barred by the proceeding, which was one out of the common course. That, I think, is a strong authority to show what the understanding of Lord HARDWICKE was. But there is another case before the same eminent Judge, very loosely reported it is true, but still throwing considerable light on the point now

\* 835 in question: I allude to \* *Lewis v. Nangle*. (a) There a bill was filed by the devisee of an equity of redemption to redeem, and the objection was made that he had not made the heir-at-law a party; and in reference to that Lord HARDWICKE says, that it is not necessary in every case for a devisee of an equity of redemption to bring the heir-at-law before the Court; that he need do that only when his object is to have the will established. The observation which has been made on that is, that Lord HARDWICKE might be referring only to cases where there were trusts; but that seems to me a very strange interpretation, because one does not very well see how the devisee of an equity of redemption would have had any thing to do with the trusts of the will: he claims independently of those trusts by a title paramount. I think, therefore, that that case, as well as *Berney v. Eyre*, is very strong to show that Lord HARDWICKE did not understand that there was any necessity for the existence of trusts in order to enable a devisee to file a bill to establish a will. Again, there is the circumstance, though I do not rely very much upon it, that Lord ELDON, in the case of *Bootle v. Blundell*, (b) which was referred to, alludes to bills to establish wills by the description, as if they had acquired a sort of generic or specific name, of "an establishing bill." It may be said that Lord ELDON only meant to allude to cases where there were trusts to be carried into execution: this is possible, but I can only say that there is not the least trace of any such distinction having been present to his mind.

Thus the authorities seem strongly to indicate that Lord KING (from the case of *Colton v. Wilson*), Lord HARDWICKE \* 836 (from the cases of *Berney v. Eyre* and \* *Lewis v. Nangle*), and Lord ELDON (from the case of *Bootle v. Blundell*), considered it as the elementary doctrine of this Court that such

(a) 2 Ves. 431.

(b) 19 Ves. 494.

bills might be sustained. Then come two cases in modern times, which are the nearest, I can hardly treat them as any thing else than decisive, authorities on the point; I mean the cases of *Grove v. Bastard* (a) and *Grove v. Young*. (b) There had been in the first a decision by the Lord Justice KNIGHT BRUCE, when Vice-Chancellor, decreeing specific performance of a contract which had been entered into for the sale of an estate which had been devised, and this was appealed to the Lord Chancellor; there was a question whether the will had not been obtained unduly, so as to make it a will that could not be supported, and Lord COTTENHAM, though expressing no opinion whether the preponderance of evidence was one way or another, thought that it was a case in which the Court was not driven to the inconvenience (to give it no other name) of deciding that a party must take a title in the absence of somebody who might afterwards controvert it; he said that all difficulty of that sort might be avoided by refusing to decree specific performance until the will had been established. It is perfectly true that in this case there were trusts, and that the sale was under a trust; but Lord COTTENHAM does not advert to that: he decides simply that there must be a bill filed to establish the will. A bill was filed accordingly, but it contained no allusion to the trusts, and thus it was as much open to a demurrer as the bill in the present case: no such objection was, however, taken; and the will was upon that bill finally established on the hearing of the second case before the Vice-Chancellor Sir JAMES PARKER. This appears to me to be a distinct authority in favour of the proposition now before us on the part of the plaintiffs. Independently

\* of this, I think that the number of bills filed to establish \* 837 wills and to carry trusts into execution, unless there is something more to distinguish them than has yet been shown, are authorities in favour of bills to establish where there are no trusts to execute: I have pointed out why what has been relied upon as authority by inference against that proposition does not seem to me to be entitled to any weight, and why I consider that there are in truth authorities, not direct but strongly indicating the opinion of successive Chancellors, that such bills may be maintained.

I have hitherto assumed that there is no direct authority in

(a) 2 Phil. 619.

(b) 5 De G. & S. 38.

favour of the proposition of the defendants; but two cases have been relied upon as being authorities directly in point, and these I will now notice. One is the case of *Mackrell v. Hunt*, (a) of which *Mr. Younge* has furnished a note from the Registrar's Book. It appears that the testator had by his will made a devise, which I suppose must be taken to be a legal devise, that there had been a great deal of dealing by the devisee with the property, that a mortgage for years had been created which was afterwards foreclosed, and that the mortgagee was in the position of a purchaser of a leasehold interest (500 years) in the property; that afterwards the mortgagee died, and by his will disposed of the leasehold interest which he had so acquired; that a bill was then filed by his next of kin or residuary legatees against his executors to carry into execution the trusts of his will, and that, under the decree made in the suit, Fludyer became the purchaser of the leasehold interest; that, wishing to have his title made secure, Fludyer filed a bill (*Fludyer v. Montague*) against the heir of the original testator: it also appears that there was some \* 838 question whether the \* testator was of sound mind, that witnesses were examined, and that the cause came on for hearing before the Master of the Rolls, who dismissed the bill, but without prejudice to perpetuating the testimony; and that then arose the question in the cause which is reported; namely, who was to bear the costs of the bill which had been filed by Fludyer. On what had been done by the Master of the Rolls Lord HARDWICKE observed that it was right to dismiss the bill, but that it was unnecessary to make the reservation as to perpetuating the testimony, for the evidence would not have been affected by the dismissal of the bill generally: as to the costs, he decided that they should be apportioned on the principle of *Berney v. Eyre*; the purchaser had so much of the costs as were occasioned by proceedings necessary to perfect his title, but certain other of the costs he did not receive. What is relied upon is this, that the Master of the Rolls dismissed the bill subject to a restriction which Lord HARDWICKE said was not necessary, and that thus the bill was dismissed. Except, however, that the bill was dismissed, the case is no authority at all. Unfortunately, we have no report of the argument, so that we do not know on what ground it was that

(a) 2 Madd. 34 n.

the bill was dismissed: if it was because there were no trusts in the original will, it would undoubtedly be an authority coming exactly to the point now in dispute, but that is not so stated, and the decision may have proceeded on very different grounds: both the Master of the Rolls and Lord HARDWICKE may have thought that a party who had merely entered into a contract to purchase a leasehold interest that was derived under a will under which parties had been acting for a great number of years, had not such an interest as entitled him to file such a bill; that may have been the ground, but I cannot come to any satisfactory conclusion upon it. The decision can, however, hardly be taken as one of Lord HARDWICKE; he merely adopts the decision \* of the \* 839 Master of the Rolls as to dismissing the bill, with the observation that there was no necessity to make a reservation as to the evidence. I consider, therefore, that it would be far too much to rely on the very loose and unsatisfactory note we have of this case as establishing a proposition so important, and so much, as it appears to me, at variance with the other authorities as that for which the defendants contend. The other case which is relied upon does not, I think, touch the present; I mean that of *Strickland v. Strickland*. (a) There, a mere legal devisee out of possession filed a bill against the heir who was in possession, praying certain relief, and Lord LANGDALE held that, as there was no impediment to prevent the trial at law, his course was to recover possession by ejectment, and that the Court had no jurisdiction.

It appears to me, therefore, that the decree below was right, and right on these grounds: namely, that bills to establish wills by devisees having trusts to execute are of every-day occurrence; that to the heir-at-law it is of no importance whatever whether the devisee is to recover for his own use or for the benefit of others; that such bills, therefore, by devisees in trust are conclusive authorities in favour of the present bill, and that, even if there were no authorities directly in point, yet the language of Lord KING, Lord HARDWICKE, Lord ELDON, Lord COTTENHAM, and Sir J. PARKER seems to me to indicate pretty clearly their opinions in favour of such a bill. For these reasons, I think that the judgment of the Court below was perfectly right and ought to be affirmed.

THE LORD JUSTICE KNIGHT BRUCE. — Without asserting or denying that the bill in this case ought to be considered as in  
\* 840 the nature of a cross-bill, \* or that the settlement alleged to have been executed by the plaintiff, on the 50th section or any other provision of the Statute of 1852, for amending our practice and course of proceeding here, assists the plaintiff, I assume each of those points to be against her. I had doubted whether it was not arguable that, by the Irish decree stated on the record, notwithstanding the appeal to the House of Lords, her right of suing in respect even of English land as a devisee of the alleged testator was defeated or suspended. The bill, however, seems to me at present to be so framed as to exclude a demurrer on the ground *rei judicate*, or of the pendency of another suit; but I wish to be understood as not binding myself upon the question of the materiality or immateriality of the Irish proceedings at some future stage of this cause, that is to say, as not intimating any opinion, whether, by reason of them, it may or not be right hereafter to decide it against the plaintiff.

With regard to the allegations respecting the heirship, they are sufficient against these defendants.

There remains but the point mainly, if not solely, argued before us, — a point as to which some text-books of merit, including the excellent treatise of Lord REDESDALE, may perhaps be thought to have added to the defendants' plausible grounds of debate. The proceeding in equity to establish an alleged will of real estate against an heir out of possession is not wholly, if it is in any sense or to any extent, for his benefit. His consent is not required, nor his dissent regarded. It is in vain for him, with whatsoever truth, to say to the Court, "I am not, and the plaintiffs or those in the same interest with them and adverse altogether to me are, in possession of what is claimed. I have not disturbed  
nor am I disturbing any of them. Nineteen years or more  
\* 841 have yet to elapse \* during which I may be quiescent without incurring a statutory bar. I may or may not sue hereafter. I know not whether I shall. I know not whether the alleged will is good or bad. I shall probably some years hence be better able to support the expense of a lawsuit than I am at present. When I shall embark in litigation, if at all, I shall prefer, upon a question purely legal, the exclusive administration of

justice by a Court of Law, which, in the event of my failure in one action of ejectment, though on the merits, will certainly allow me to bring one or two more ; whereas, under an establishing bill, the question whether there shall be a second trial will or may rest exclusively with the Court of Chancery, which may bind the right by one." All this I repeat amounts to nothing. Brought hither, he must try within the time here thought reasonable, or be for ever precluded, and, trying, he may possibly be conclusively barred by the result of one trial ; as to which I need not refer to *Waters v. Waters*, (a) decided by myself, or to the authorities that preceded it.

Now this course, this manner of proceeding against an heir, may seem to some persons harsh practically and not upon principles of legal science justifiable. But others may think, and probably without error, differently, may consider, and probably with correctness, that so to proceed is convenient, is in accordance with sound maxims of jurisprudence, is consistent with the enlightened administration of justice, and not without support analogically from things habitually and familiarly done in more than one branch of English judicature. These observations I make if not with more, certainly not with less, confidence by reason of the recent Act of Parliament that has just been mentioned. It is clearly proved by a \* long course of usage and practice that the \* 842 jurisdiction to which I have been alluding, a jurisdiction, namely, to establish wills of real estate against heirs-at-law out of possession, a jurisdiction exceeding materially the mere perpetuation of testimony, exists in the Court of Chancery ; nor has this proposition been denied. The argument based to a certain extent on the language of a highly esteemed text-book to which I have before referred has been that it is a jurisdiction exercisable only in certain cases, exercisable in those instances where the will, if valid, creates a trust of real estate,— within the province of the Court, as a Court for administering trusts, to carry into execution, but not exercisable in the case of a will of the simple description of that attributed to the alleged testator in the present cause, creating neither charge nor trust. Upon what principle or reason, however, not applicable to each case, the jurisdiction can have been exercised in either, I have been and I remain unable to discover.

(a) 2 De G. & Sm. 591.

. Where an instrument alleged to be an effectual will of freehold estate does, if valid, disinherit the heir altogether, not merely as to all legal but also as to all beneficial interest, and the heir says that the will is a forgery or void against him on the ground of fraud, or insanity, or insufficient attestation, or the want of signature, and there is no other question with him, how can he be rationally, at least how can he be consistently with principle or analogy, held liable or not liable to a particular jurisdiction as the contents of the alleged will may be of one kind or another, may purport to create or not to create a charge or a trust? Let me state a case: A., out of possession, claims to be of right immediately entitled legally and beneficially in fee-simple to Blackacre and Whiteacre, and alleges an intention at some future time to sue for recovering each. This claim is adverse to

\* 843 all \* other persons whomsoever. Blackacre is in the possession of B., who professes to be and — if A. has not the title alleged by him — is rightfully seised in fee of it, in trust to pay the debts of C. and subject to that, in trust for C. and D., an assertion in which C. and his creditors and D. concur. Whiteacre is in the possession of E., who professes to be and — if A. has not the title alleged by him — is rightfully seised in fee of it for E.'s own benefit absolutely. The case as to one property is not otherwise different from the case as to the other, and there is not one material fact besides. Under such circumstances, to suggest that for the purpose of obtaining a judicial decision against the validity of A.'s alleged title he is liable to be sued by B., by C. or his creditors, or by D. as to Blackacre, but is not liable to be sued by E. as to Whiteacre, is, I apprehend, to suggest something so near an absurdity as not to be distinguishable from it; and this upon grounds not less of English law than of general jurisprudence.

In suits for carrying into effect trusts created, or purporting to be created, by will of real estate wholly and in every sense disinheriting the heir, there seem to have been several reasons more or less sound for making the heir, or requiring him to be made, a party, when within the jurisdiction, even though the testator had died legally as well as beneficially seised. One, that property, which might prove to be the heir's, might not (to the possible embarrassment of his rights) be, without hearing him, dealt with as not belonging to him; another, that there might be a complete determination; and a third, if not included in the second, that

the purchasers (though the Court does not and did not warrant the title of lands which it orders to be sold) and others, affected by the proceedings, might if possible be protected from any claim of the heir at a subsequent time. But the Court, \* I \* 844 repeat, could not, as it seems to me, have justly or reasonably prescribed or allowed such a course without the heir's consent, unless upon the notion of a jurisdiction to bring him before the Court for the purpose of proving and then establishing the will against him, arising upon the mere fact of any devise, or alleged and apparent devise, adverse to the right of the heir in that character.

It has been argued, perhaps plausibly, but not so as to convince my mind, that if the bill before us is right on the point now under consideration, there could not or would not have been bills to perpetuate testimony to wills of real estate by devisees in possession; of which I have seen the record of one signed by a counsel of the sagacity and learning of the late Mr. Bell. I can, however, conceive various states of circumstances in which a devisee in possession might well be advised even by a lawyer, believing that he might take either course, to take that of perpetuating testimony merely; and with respect to the rule of the Court, I apprehend that where a man is entitled to proceed in equity, and only in equity, for the purpose of obtaining as a plaintiff an adjudication upon a question of fact in which he is interested, it is competent to him to file a bill for the purpose merely of perpetuating testimony upon that question,—at least if his adversary would, whether plaintiff at law or defendant at law, have a good case in a Court of Law, either in any event, or upon the supposition of a material fact, alleged by the plaintiff in the bill for perpetuating testimony, being untrue. It may be argued, that in the instances in which the defendant's learned counsel properly admit the existence and long exercise of the jurisdiction in question, it contravenes the maxim, "*Non debet actori licere quod reo non permititur*," is anomalous, and is one rather to be restricted than extended. \* But may we not respectfully ask, whether it is \* 845 clear that the anomaly is not the other way, whether the Court in testamentary cases might not for the heir, and might not in cases not testamentary, have well taken the course which it has taken in those instances of "establishment" that are without dispute acknowledged? If I must either attribute to some Judges



a reverence more for the letter than the spirit, caution carried too far, and over-anxiousness to keep themselves within the most clearly defined limits of their authority, or ascribe to others an arbitrary and unwarrantable assumption of legislative power, I elect the former.

Had I found a decision based certainly on the opinion that though a will could be established here in the instances that are acknowledged, it could not be in such a case as the present, or in a case not substantially in this respect dissimilar, I might have deemed myself bound not to act according to my individual judgment. But I am not aware of any such decision, disbelieving as I do that in *Mackrell v. Hunt*, (a) in *Fludyer v. Montagu*, (b) or in *Strickland v. Strickland*, (c) the Court meant to determine any such point. Let it be assumed, though I do not assert, that the causes of *Grove v. Bastard* (d) and *Grove v. Young* (e) (in one of which it seems to have been adjudicated between a vendor and a purchaser, that the former could sustain his contract only on the condition of obtaining the establishment against an heir of a will, which the heir had failed at law on the merits in attempting to subvert) are of no weight or account against the present defendants. Let it be assumed, though I do not represent myself as persuaded, that no instance of the exercise of the jurisdiction in

question upon a simple devise in fee of a freehold estate, \* 846 without charge \* or trust of any kind, can be found. Still I say, borrowing from Lord ELDON's judgment in *Bax v. Whitbread*, (g) that I will not confine myself to the inquiry, whether a case precisely the same has ever occurred, or take, "as my rule of acting, that circumstance instead of the principle decided by former cases." Why am I, without necessity and without reason, to treat the example as limiting the rule? It has been properly conceded that the series of direct decisions establishing wills in this Court, at least those previous to 1841, cannot be set at nought, but bind as far as they extend. If so, they must be considered not as having created (which they could not), but as having obeyed law, that is to say unwritten law. Upon questions, however, of unwritten law, the force of authorities and precedents is not confined to cases of which all the circumstances, however accidental, agree with theirs,

(a) 2 Madd. 34 n.

(d) 2 Phil. 619.

(b) *Ib.*

(e) 5 De G. & Sm. 38.

(c) 6 Beav. 77.

(g) 10 Ves. 31.

to instances as like as *apis api*, but, where a positive law forbidding the extension is not shown, extends to those which, differing in some particulars, differ in no essential circumstance, or cannot in legal reason or legal principle be substantially distinguished. We should otherwise indeed be in a dark and strange state.

Lord COKE and a celebrated Frenchman of the same age say, — one, “Nullum simile quatuor pedibus currit;” the other, “Tout exemple cloche;” and cases are continually governed in our Courts by authorities not, according to our vernacular phrase, upon all fours with them. In the language of a distinguished jurist, “Quid enim notius et certius quam exempla non restringere regulam,” (a); and again, “Exempla non restringunt regulam sed loquuntur de casibus crebrioribus.” (b) It \* seems \* 847 to me that to accede to the defendant’s view of the precedence would be unnecessarily to cripple the power of usefully administering justice; would be practically inconvenient and theoretically wrong; would be to confound essentials and accidentals; would in effect be doing what Lord ELDON, in *Baz v. Whitbread*, (c) so manifestly disapproves when he says, “I think it better to declare that the Court will not abide by these decisions than to overrule them in effect, professing to abide by them.” So I venture to say here with respect to those almost innumerable cases upon the establishment of wills abounding in our records, of which no man disputes the soundness.

This demurrer cannot stand.

THE LORD JUSTICE TURNER. — The principal question in this case is, whether it is competent to a mere legal devisee charged with no trust or duty to file a bill in this Court against the heir-at-law for the purpose of establishing the will against him. This question has been so thoroughly examined by the Vice-Chancellor that it is difficult to add any thing to his judgment upon it, and the observations which I shall make upon the case will therefore be confined for the most part to the arguments by which the judgment has been attempted to be impeached.

It was insisted in the first place, on the part of the appellant, that, as between a mere legal devisee and an heir-at-law, the question of the validity of the will is purely a legal question, and one there-

(a) Donellus de Jure Civili, Lib. 7, c. 13.

(b) *Ib.*, L. 9, c. 2 n.

(c) 10 Ves. 31.

fore with which this Court has no concern ; but although the question is undoubtedly legal, it does not therefore follow that this Court has no jurisdiction over it. The jurisdiction of this \* 848 Court extends \* to cases of dower and partition, where the estates to be dealt with are legal, and it is duly exercised in many matters as to which it would be difficult, if not impossible, now to trace the mode in which it originated. It cannot, therefore, as I think, be said that there is no jurisdiction in this Court upon such a case as the present, merely because the question to be dealt with is a legal question.

It was then, however, said on the part of the appellant, and the great weight of the appellant's argument rested upon this point, that there is no precedent for the interference of this Court in such cases, — that the Court has never interfered to establish a will against the heir-at-law, except where there are trusts to be executed under the will, — that the jurisdiction to establish the will is no more than an incident to the execution of the trusts, and some authorities were cited on this part of the case to which I shall presently refer ; but looking at the case without reference to authorities, this question arises, — Does the fact of the jurisdiction being exercised where there are trusts to be executed under the will negative the existence of the jurisdiction where there are no such trusts ? Is the jurisdiction confined to cases in which there are trusts to be executed, or are those cases instances only of the exercise of a more extended jurisdiction ? There are several points of view in which this question must be looked at.

In the first place, is it the law of this Court that trusts created by a will cannot be executed without the will being established against the heir-at-law ? I do not take it to be so. If the trustee admits the will, and does not require that the heir should be brought before the Court, there must necessarily, as I apprehend, \* 849 be a decree to execute the trusts. The establishment of the will, therefore, is not a necessary incident to the execution of the trusts.

In the second place, what is the position of the heir ? He has an apparent legal right ; his right if it prevails is paramount to the will. He has not and never can have any concern with the trusts created by it. How, then, can the execution of those trusts be the foundation of the right to establish the will against him ?

In the third place, if the right to establish the will against the

heir depends upon the existence of trusts, to be executed under the will, why is it that the right is not measured by the trust which is to be executed? But this is not the case. If one only of several devised estates be made subject to a trust, the issue directed is not whether the particular estate is well devised by the will, but a general issue "*devisavit vel non*," and the decree which follows upon the issue, if found in the affirmative, is not a decree to establish the will as to the estate made subject to the trust, but a general decree to establish the will. It may be said that such a decree would operate only between the parties to the suit, but suppose the bill to be filed by the *cestuis que trustent* of the estate devised in trust, whose right to file it cannot be denied, and the devisees of the other estates made defendants to the bill, could the heir be permitted afterwards to bring ejectment against those other devisees? I take it to be clear that he could not. Again, how does the case stand with reference to a limited trust or duty, the case, for instance, of a charge on real estate for the payment of debts? Does the Court suspend its decree for the establishment of the will against the heir until it is ascertained whether the primary fund, the personal estate, is sufficient? I have met with no such case.

\* In the fourth place, it is difficult to see how the execu- \* 850  
tion of the trusts can in any case render it necessary that the will should be established against the heir. Surely the mere fact of the heir being party to a suit in which the decree is made for executing the trusts must of itself be sufficient to prevent him from disputing any thing which is done under that decree. These considerations appear to me to be irreconcilable with the notion that this jurisdiction is confined to cases in which there are trusts to be executed under the will.

Another argument which was much relied on upon the part of the appellant was, that, in the usual course of the Court, bills are filed by devisees to perpetuate the testimony of witnesses to wills, and this argument was or might have been pushed to this extent, that bills to perpetuate can only be filed where the matter in question cannot be brought to immediate trial, and that the practice of filing such bills therefore negatives the right to bring the validity of the will to an immediate issue by filing a bill to establish it. But this argument proves too much, for it is not disputed that a *cestui que trust* or a devisee in trust can file a bill to establish a

will, and yet it cannot be doubted that either of these parties might file a bill to perpetuate the testimony of the witnesses to the will. The existence of this right to perpetuate testimony goes far to account for the scarcity of precedents of bills to establish wills, which was also relied on by the appellant. A devisee, if in possession, is not likely to invite litigation by filing such a bill when he has the means of securing his evidence in the event of future litigation, and if out of possession he has a more easy remedy by ejectment.

Another argument adduced on the part of the appellant \* 851 was that if the devisee was entitled to sue the heir \* for the purpose of establishing the will against him, there ought to be a reciprocal right on the part of the heir, but that no such right exists. The position of the heir, however, is wholly different from that of the devisee. The heir derives his title from the law. He wants no declaration of this Court to give effect to his title, but the title of the devisee depends upon the act of the testator, and the declaration of this Court affirms the validity of that act.

These were the main arguments on which the appellant's case was rested. For the reasons which I have given they have failed to satisfy my mind that this Court has not the jurisdiction for which the respondent has contended. Some authorities, however, were referred to on the part of the appellant, and it will be right to examine them. The most material of them were *Mackrell v. Hunt*, (a) *Devonsher v. Newenham*, (b) *Lord Fingal v. Blake*, (c) and *Strickland v. Strickland*. (d)

In *Mackrell v. Hunt* the case was this: Noah Bertin devised freeholds to his wife in fee and died. The wife married again; she and her second husband levied a fine to the use of the second husband in fee. The second husband mortgaged for a term of five hundred years. The mortgagee foreclosed and afterwards died. Under her will the term became vested in her executors, and the suit being instituted for the administration of her estate, the term was sold under the decree. The purchaser of the term under the decree then filed a bill against the heirs of Noah Bertin, and against the parties claiming under the will of the mortgagee, praying that he might prove Noah Bertin's will, so that the \* 852 testimony \* of his witnesses might be recorded and pre-

(a) 2 Madd. 34, n.

(c) 1 Moll. 113.

(b) 2 Sch. & Lef. 199.

(d) 6 Beav. 77.

served *in perpetuum rei memoriam*, and that the heirs might show cause why the will should not be established, and that he, the purchaser, might hold the property and receive the rents, and that the five hundred years' term might be assigned to him. The heirs of Noah Bertin, by their answer, disputed the will. Issue was joined. Witnesses were examined, and the cause set down, and upon the hearing the Master of the Rolls dismissed the bill with costs against the heirs, but without prejudice to the perpetuating the testimony of the witnesses, and as to the other parties ordered that on payment of the purchase-money they should assign to the purchaser. The purchaser afterwards applied by petition in the original cause for the costs which he had incurred, and Lord HARDWICKE gave him the costs which he had incurred in proving the will, and also the costs which he had paid to the heirs who had examined no witnesses. This case was very much relied on upon the part of the appellant, because the bill which sought to establish the will was dismissed against the heir; but it is to be observed that the bill was filed by a purchaser, and, according to the old rules of this Court, a purchaser was entitled to require the will to be proved against the heir; but he never had, so far as I am aware, any right to have the will established, and it is evident that the decision proceeded upon this ground, for the Master of the Rolls dismissed the bill without prejudice to the perpetuating the testimony, and Lord HARDWICKE gave the purchaser the costs of perpetuating it.

The next case was *Devonsher v. Newenham*. (a) There the bill was filed by parties claiming to be beneficially entitled under the will of a testator who had been tenant \* in tail, \* 853 and had suffered a recovery, to have the rights of the parties declared and the trusts of the will carried into execution, and a tenant in tail in remainder, who would have been entitled if the recovery was bad, was made a defendant to the bill. The Court held that the bill could not be maintained against him, his title being paramount; but it is remarkable that Lord REDESDALE distinguishes the case from that of the heir-at-law, against whom, however, the bill would in any event have been maintainable in that case, as there were trusts to be executed.

*Lord Fingal v. Blake*, (b) the next case on which the appellant relied, is more in point, and is entitled to considerable weight as

(a) 2 Sch. & Lef. 199.

(b) 1 Moll. 113.

indicating the opinion of a Judge who, from his long experience, was intimately acquainted with the practice of the Court. Sir ANTHONY HART, in that case, said that, where there was a trust to be executed, an issue was to be directed ; but that, where there was no trust, the Court had no ground to interfere in directing the mode of trial, but had only to take care that a fair trial should be had by putting outstanding terms aside ; from which it would seem to follow that, if there were no outstanding terms, no relief could be given by the Court. But much of the weight which is justly due to this authority is removed by the circumstance that, in the case in which this opinion was pronounced, there was in fact a trust, and the opinion therefore was extra-judicial. It does not appear indeed that the point was at all argued, and the opinion pronounced upon it does not seem to me to be reconcilable with what was done by Lord HARDWICKE in *Berney v. Eyre*. (a) No great reliance, therefore, can, I think, be placed upon the dictum in *Lord Fingal v. Blake*, (b) and, as to the remaining \* 854 \* case of *Strickland v. Strickland*, (c) I think that still less weight can be attached to it ; for I do not perceive by the report that Sir George Strickland in that case claimed in the character of heir, and if he did I am confident that the point insisted upon by the appellant in this case was not then brought under the attention of the Court.

The only other authority relied on by the appellant which I think it material to notice was a passage cited from Lord REDESDALE'S Treatise on Pleading, (d) in which he says that to a bill to carry into execution the trusts of a will disposing of real estate by sale or charge of the estate, the heir-at-law of the testator is deemed a necessary party, that the title may be quieted against his demand, for which purpose the bill usually prays that the will may be established against him by the decree of the Court. But this passage, as I understand it, is rather against than in favour of the appellant's argument, for Lord REDESDALE does not say that the jurisdiction over the heir is founded on the right to have the title quieted against his demand, which would indeed be in opposition to his decision in *Devonsher v. Newenham*, (e) but he assumes the existence of the jurisdiction, and says that where the disposition is for

(a) 3 Atk. 387.

(d) 3d edit. 139.

(b) 1 Moll. 113.

(e) 2 Sch. & Lef. 199.

(c) 6 Beav. 77.

sale or charge — confining his observation to those cases — the Court requires it to be exercised.

The authorities cited on the part of the appellant do not, therefore, appear to me to bear out the position for which he has contended, that it is only in cases where there are trusts to be executed that this Court exercises the jurisdiction of establishing the will against the heir. \* On the other hand, there are the \* 855 cases referred to in the Vice-Chancellor's judgment which show that the jurisdiction has been more extensively exercised, and that Judges of the highest authority have spoken of it in terms importing that it is of general application. It would be an idle waste of time again to go through the authorities cited by the Vice-Chancellor. It is sufficient to say that as I read them they embrace decisions of Lord HARDWICKE and Lord MANNERS, dicta of Lord ELDON, and decisions of my learned brother, and of the late Sir JAMES PARKER, independently of the case before Lord COTTENHAM, on which, perhaps, it would not be safe to rely, as his observations may possibly have had reference to the trust which existed in that case. These decisions and dicta, as it seems to me, far outweigh the authorities cited on the part of the appellant.

Much has been said in the progress of this case upon the origin of this jurisdiction, but it is of little importance how the jurisdiction originated, if it be found to exist. In this respect, I entirely agree in the opinion expressed by Mr. Fonblanque in the Treatise of Equity. He there says, "To establish the origin of any branch of legal or equitable jurisdiction is always difficult and seldom necessary, provided the exercise of such jurisdiction be conducive to the ends of substantial justice." And that the exercise by this Court of jurisdiction in such a case as the present is conducive to the ends of justice I feel no doubt whatever. The Vice-Chancellor has probably traced the jurisdiction to its true source; but other sources are not wanting from which also it may have originated. It has been the constant course of the Ecclesiastical Courts of this country to entertain suits for the probate of wills in solemn form, and the sentences in such suits are conclusive, and in effect establish the wills against the next of kin as to the personal estate. \* It is not, I think, improbable that the ecclesias- \* 856 tics, who, in early times, held the office of Chancellor, may have introduced their practice into this Court, and applied it to real estate. Again, in early times, when the custom of devising



prevailed in cities and boroughs, it seems to have been the usual course, where the title of a devisee was disputed, to issue the writ, *ex gravi querelâ*, commanding the officers of the city or borough to admit the will to proof, and to do right to the devisee. There are several instances of such writs in Fitzherbert, and it is, I think, by no means improbable, that when the power of devising became general, this Court assumed the jurisdiction which had before been locally exercised. I am also very much disposed to think that this Court formerly interfered in cases of apprehended future claims to a much greater extent than it has done in modern times. The case of *Baker v. Shelbury (a)* is an instance of its having done so. The origin of the jurisdiction, however, is more a question of curious research than of importance to the decision of the present case.

Upon the whole, the conclusion at which I have arrived is, that this Court has jurisdiction to establish a will against an heir-at-law at the suit of a legal devisee, although there may be no trusts to be executed under the will. The other part of the case as to the effect of the proceedings in Ireland was but faintly argued on the part of the appellant, and I do not think it necessary to say more upon it than that in my opinion the bill is not open to objection upon that ground.

I think, therefore, this appeal must be dismissed.

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\* 857

\* TIDD *v.* LISTER. (b)

BASSILL *v.* LISTER.

1853. April 27, 30. May 4. December 19.

1854. January 11, 16. March 11. April 29. Before the Lord Chancellor  
Lord CRANWORTH.

Although the purchaser for value from the husband of his wife's *chose in action*, to the *corpus* of which she is entitled, is in no better position than the husband himself, yet the husband's assignment for value of his wife's equitable life-interest will prevail against her if he afterwards deserts her and leaves her

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(a) 1 Cases in Chancery, 70.

(b) S. C., 29 Beav. 618; 18 Jur. 543.

destitute; if he deserts his wife, a Court of Equity will not help him to get at the fund without securing to the wife a portion of the income, but this consideration is inapplicable to the assignee of the husband.<sup>1</sup>

The income of a married woman's life-estate had been ordered to be received and applied by a receiver in a suit, in payment of her husband's incumbrances: *Held*, that arrears of income in the receiver's hands which had not been paid as directed were nevertheless, by the effect of the order, reduced into possession so as to disentitle the wife surviving to such arrears.

Husband and wife joined in creating two mortgages on the life-interest of the wife in freehold and copyhold estates, the first mortgagee having a charge on both freeholds and copyholds, and the second on the freeholds only: *Held*, that as against the wife surviving, the second mortgagee was entitled to require that the first mortgagee should be satisfied out of the copyholds so far as they would extend.<sup>2</sup>

Testator being possessed of real and personal estate directed the latter to be invested in government securities, the interest whereof, with all the rents and profits from freehold, copyhold, or leasehold property, after payment of all his debts, &c., he gave and devised upon certain trusts: *Held*, that this did not evidence a sufficient intention to create a mixed fund, so as to exempt the application of the personal estate in the first instance from the discharge of his debts.<sup>3</sup>

THE facts of this case are so fully set forth in the tenth volume of Mr. Hare's Reports, page 140, and recapitulated in the judgment of the Lord Chancellor, that it will be sufficient here to state that the appeal was by the plaintiff Elizabeth Tidd from the decision of the Vice-Chancellor TURNER, who determined the four following points against the plaintiff: first, that though deserted by her husband she was not entitled as against his particular assignee to maintenance out of the income of the real and personal estate to which she was entitled in equity for her life; secondly, that though moneys coming to the hand of a receiver \*in a cause in which the husband and wife were \*858 parties might be considered as not reduced into possession,

<sup>1</sup> See *Lewin Trusts* (5th Eng. ed.), 531, 535; *Re Duffy's Trusts*, 28 Beav. 386; 1 Lead. Cas. in Eq. (3d Am. ed.) [341], [370] *et seq.*, and notes to *Lady Elilbank v. Montolieu*; *Scott v. Spashett*, 3 M'N. & G. 599, and cases in notes.

<sup>2</sup> See 2 Lead. Cas. in Eq. (3d Am. ed.) [56], [69], [79], [80], in notes to *Aldrich v. Cooper*; *Hughes v. Williams*, 3 M'N. & G. 690; *Gibson v. Seagrim*, 20 Beav. 614; *Baldwin v. Belcher*, 3 D. & War. 176; *In re Cornwall*, 3 C. & L. 131; 3 D. & War. 173; *In re Fox*, 5 Ir. Ch. 541.

<sup>3</sup> 2 *Jarman Wills* (3d Eng. ed.), 594; *Tench v. Cheese*, 6 De G., M. & G. 453; *Blann v. Bell*, 5 De G. & S. 665; *Bentley v. Oldfield*, 19 Beav. 925; *Ellis v. Bartrum*, 25 Beav. 110.

yet where, as in this case, the husband had created incumbrances on his wife's property, and the Court had ordered moneys to be applied in favour of the incumbrancers, the effect was to divest the title and reduce into possession the moneys which were the subject of the order; thirdly, that there was not a sufficient indication of intention to create a mixed fund so as to exempt the application of the personal estate in the first instance from the discharge of debts in a case where the testator had given all his real and personal property to trustees, and directed his personal estate to "be put out into government security, the interest whereof with all the rents and profits from freehold, copyhold, or leasehold property," after payment of his debts, and the premiums on certain policies of insurance, was given on the trusts therein mentioned; fourthly, that the husband and wife having joined in creating two mortgages on the life-interest of the wife in certain freehold and copyhold property, and the first mortgagee having a charge on both the freeholds and copyholds, and the second mortgagee upon the freeholds only, the latter was entitled, as against the wife surviving, to require that the former should be satisfied out of the copyhold property, so far as it would extend.

*The Solicitor-General and Mr Leach*, for Mrs. Elizabeth Tidd, the appellant. — We submit that Mrs. Tidd, having been deserted by her husband, was entitled, as against his particular assignee, for value to a settlement out of her life-estate. There is no ground for the distinction laid down by the Vice-Chancellor that the assignee for value of the life-estate of the wife is in a better position than the assignee for value of a capital sum; both take, \* 859 subject to the \* same equity under which the husband is entitled to his wife's property; namely, the obligation of maintaining her. On this principle it is, that when property of the wife cannot be reached by the husband without the interposition of this Court, equity will withhold its assistance until it has secured to the wife a suitable provision. There is clearly no difference in principle between the equity affecting a general and particular assignee for value in reference to the wife's property, as both stand in the shoes of the husband. [They relied upon the following cases: *Jewson v. Moulson*, (a) *Pryor v. Hill*, (b) *Macau-*

(a) 2 Atk. 417.

(b) 4 Bro. C. C. 138.

lay v. Philips, (a) *Sturgis v. Champneys*, (b) *Lord Elbank v. Montolieu*, (c) *Wilkinson v. Charlesworth*, (d) *Richards v. Chambers*, (e) *Bond v. Simmons*, (g) *Whitmarsh v. Robertson*, (h) *Scott v. Spashett*, (i) *Vaughan v. Buck*, (k) *Dunkley v. Dunkley*, (l) *Wortham v. Pemberton*, (m) *Greedy v. Lavender*, (n) *Whittle v. Henning*. (o) They referred to and commented upon the cases of *Elliott v. Cordell*, (p) and *Stanton v. Hall*. (q)

*Mr. Walker* and *Mr. Hardy*, for the Messrs. Phillips, who were the first mortgagees, being incumbrancers on both the freehold and copyhold property, took no part in the argument.

*Mr. Rolt* and *Mr. Eddis*, for Mrs. Bassill, the second mortgagee, whose security was on the freeholds only.—The cases of *Wright v. Morley*, (r) *Elliott v. Cordell*, (p) \* and \* 860 *Stanton v. Hall*, (q) clearly show the reason of the distinction between the purchase of a life-interest and an absolute interest of the wife's: in the former case, the consent of the wife is not requisite in order to enable the husband to receive it; nor could this Court impose on the purchaser of such an interest the obligation of seeing that the husband duly maintains his wife ever afterwards. The principle of the distinction on which this Court acts, as between the general and particular assignee, is founded upon this, that in the case of a bankrupt the inability to maintain his wife is coincident with the title of the assignee; but in the case of the particular assignee, the presumption is that the husband is of ability and is maintaining his wife.

*The Solicitor-General*, in reply.

It was then contended by the appellant, upon the authority of *Stiffe v. Everitt* (s) and *Whittle v. Henning*, (o) that the arrears

(a) 4 Ves. 15.

(b) 5 M. & C. 97.

(c) 5 Ves. 737.

(d) 10 Beav. 324.

(e) 10 Ves. 580.

(g) 3 Atk. 20.

(h) 1 Coll. 570.

(i) 3 M. & G. 599.

(k) 1 Sim. N. S. 284.

(l) 2 De G., M. & G. 390.

(m) 1 De G. & S. 644.

(n) 13 Beav. 62.

(o) 2 Phil. 731.

(p) 5 Madd. 149.

(q) 2 Russ. & M. 175.

(r) 11 Ves. 12.

(s) 1 M. & C. 37.

of income in the hands of the receiver must be regarded as a *chose in action*, and not reduced into possession before the death of the husband so as to exclude the appellant's title by survivorship.

It was also urged by the appellant that, according to the true construction of the will in question, the testator had created a mixed fund out of the rents and profits of his real estate and of his personalty, to defray debts and charges, and under such circumstances they ought not to have been thrown in the first instance on the personalty. *Falkner v. Grace.* (a)

\* 861 The appellant further submitted that being in the \* position of surety the equity to marshal did not attach as against her. *Robinson v. Gee*, (b) *Aguilar v. Aguilar*, (c) *Earl of Kinnoul v. Money*, (d) *Copis v. Middleton*, (e) *Boazman v. Johnston*, (g) *Bowker v. Bull*, (h) *Averall v. Wade*, (i) *Barnes v. Razter*, (k) *Roper's Husband and Wife*, Vol. I., p. 145, note b; *Story's Commentaries*, Vol. I., p. 644.

*Mr. Rolt* and *Mr. Eddis*, for *Mrs. Bassill*, argued that the present was simply a case in which both the real and personal estate were vested in the same persons to pay debts without any direction to sell, and that it was clear that the testator had not thereby created a mixed fund for the payment of his debts, and they relied on the authority of *Boughton v. Boughton* (l) as conclusive upon this point.

*Mr. Leach*, in reply.

December 19.

THE LORD CHANCELLOR. — This was an appeal against an order of the Vice-Chancellor TURNER, made on two petitions by the plaintiff Elizabeth Tidd. The first petition was presented on the 1st of August, 1851, by Elizabeth Tidd, by her son and next friend, her husband being then alive. He died on the 10th November, 1851, and the second petition was presented by E. Tidd, his widow, on the 26th January, 1852.

(a) 9 Hare, 280.

(b) 1 Ves. 251.

(c) 5 Madd. 414.

(d) 3 Swanst. 202, note (a).

(e) Turn. & R. 224.

(g) 3 Sim. 377.

(h) 1 Sim. N. S. 29.

(i) Lloyd & Goold, 252.

(k) 1 Y. & C. C. C. 401.

(l) 1 H. L. Cas. 406.

The main object of both petitions was the same ; \* namely, \* 862 to obtain the income of the residuary real and personal estate of Josias Lister, the father of the petitioner, who died in November, 1808.

It is not necessary to set out the contents of his will further than to say that being seised of and entitled to real and personal estate, the former being partly freehold and partly copyhold, after payment of his debts and certain premiums of insurance, he gave and devised " the remainder of his profits, rents, or interests " to trustees upon trust after the death of his wife, who died in 1819, for his daughter the petitioner, then Elizabeth Lister, spinster, afterwards the wife and the widow of W. Tidd, for her life.

In 1820 a suit was instituted for the purpose of having the trusts of the will carried into execution, and by the decree dated the 19th of December, 1820, the usual accounts were directed, and it was ordered that a receiver should be appointed of the rents and profits of the freehold and copyhold estates. A receiver was accordingly appointed, and the Master made his general report, dated the 5th February, 1822.

The report was duly confirmed, and by an order dated the 6th May, 1822, made on the petition of Tidd and his wife, W. Lister, the executor, was ordered to bring into Court the balance of the testator's personal estate then in his hands ; and the dividends thereafter to accrue due thereon were ordered to be paid to the receiver, who was ordered from time to time to pay the same, together with the net annual income arising from the rents and profits of the real estates (after making certain payments previously directed) to the plaintiffs, W. Tidd and Elizabeth his wife, or to the said Elizabeth alone, if she should survive her husband.

\* From the date of that order, the whole residuary income was paid to W. Tidd, or to incumbrancers claiming under him. He became hopelessly insolvent, and deserted his wife, the petitioner, leaving her totally unprovided for ; the whole income being exhausted by the incumbrancers. He died, as I have already stated, on the 10th November, 1851, being at that time a pauper lunatic in St. Pancras workhouse.

The object of the first petition — that is, the petition presented by Mrs. Tidd in the lifetime of her husband — was to get rid of the effect of the orders under which her life income had been

ordered to be paid to him and his incumbrancers. She contended that, having been deserted by him, and left destitute, she had in equity a right, either to the whole of her life-interest, or, at all events, to a fair provision out of it, in the same way as she would have been entitled to a settlement in respect of any principal sum of money given to her by the will. Before this petition was disposed of, the husband died, and from the time of his death she or those claiming under her clearly were entitled to the whole income thenceforth accruing; so that the question under the first petition was confined to the income which had accrued due in his lifetime.

The Vice-Chancellor was of opinion that the petitioner had no such equity as that insisted on by the first petition, which he therefore dismissed.

The second petition was presented by Mrs. Tidd, in January, 1852, after she had become a widow, and the first question thereby raised was as to a sum of 290*l.*, being the balance in the receiver's

hands in respect of the income of the copyhold and personal estate received by him between the 29th September, 1850, and the 29th September, 1851. The petitioner contended that this was to be treated as a *chose in action* belonging to her, not reduced into possession by her husband, and therefore that, on well-established principles, it was to be paid to her.

The Vice-Chancellor, however, considered that by the orders of the Court, this sum in fact had been appropriated to her husband's assignees, and so that her right by survivorship was gone. He therefore dismissed so much of the petition as related to this sum.

All question as to the income accrued due in the lifetime of the husband being thus disposed of, the next point which called for decision was as to the income accrued and to accrue due subsequently to his death. The facts as to this point were as follows: Both the freehold and copyhold estates were duly charged by the petitioner and her late husband, in his lifetime, with an annuity of 127*l.* 10*s.*, and this annuity had become vested in two gentlemen, named Phillips. This was a first charge on the petitioner's life-interest, both as regards the freehold and the copyhold property.

The petitioner had also concurred with her husband in creating a second charge on the freeholds only, for securing to Mary Tidd (but whose rights had become vested in Mary Bassill) interest on

a sum of 2000*l.*, lent to the husband, and also the premiums payable on a policy effected on the life of the petitioner for securing the 2000*l.*

The question was, whether Mrs. Bassill had not an \* equity to marshal the securities, so as to throw the \* 865 annuity on the copyholds, and thereby leave the freeholds an available security for her. The Vice-Chancellor decided in favour of this right, and his order contains the necessary directions for giving the benefit of this right to Mrs. Bassill.

The only other question was, out of what fund the premiums on two policies of insurance on the lives of the testator's two sons ought to be paid. The testator, having effected these policies in his lifetime, by his will directed that they should be kept on foot out of the income of his real and personal estate.

The petitioner contended that the whole burden of keeping on foot these policies ought not to fall exclusively or primarily on the personal estate, but ought to be borne ratably by the real and personal assets. His Honor, however, decided against the petitioner, holding that the real estate was liable only in the event of the personal estate proving deficient.

Mrs. Tidd has petitioned against the whole of the order made by the Vice-Chancellor.

She contends, first, that a provision out of the income ought to have been ordered for her on the first petition, subject of course to the annuity and mortgage, so far as she had validly charged her life-interest with the same. Secondly, that the 290*l.*, the balance of the money in the receiver's hands at Michaelmas, 1851, being after the presenting of the first petition, and shortly before the death of her husband, ought to be considered in the nature of a *chose in action* belonging to her by survivorship, and to be paid to her accordingly. Thirdly, that \* there ought to \* 866 be no marshalling of the annuity of 127*l.* 10*s.*, but that it should be paid ratably out of the freehold as well as the copyhold property. And, lastly, that the whole income of the testator's property, as well that arising from the real as that arising from the personal estate, ought to contribute ratably to keeping on foot the two policies on the lives of the testator's sons.

I will consider these several points as they are severally disposed of by the order of the Vice-Chancellor.

The question on the first petition is, whether the husband's



assignment for value of his wife's equitable life-interest shall prevail against her, if he afterwards deserts her and leaves her destitute. I think that, according to the established principles of this Court, it does so prevail.

This question was raised for the first time, so far as I am aware, in the case of *Wright v. Morley*, (a) before Sir WILLIAM GRANT. There the wife was entitled to a life-interest in dividends to the amount of 260*l.* per annum. The husband charged them, for a valuable consideration, with an annuity of 100*l.* The husband, as it was alleged, afterwards left the kingdom, without making any provision for his wife; and the question was, whether the title of the annuitant claiming under the husband, should prevail against the wife so deserted by her husband. Sir WILLIAM GRANT decided in favour of the annuitant. In that case it was not necessary to decide what were the rights of a particular assignee as distinguished from general assignees in bankruptcy, for even \* 867 against \* general assignees the wife has not a title to the whole of her life-interest, but only to a provision out of it; and as the claim of the annuitant in *Wright v. Morley* (a) was confined to 100*l.* per annum out of 260*l.*, leaving to the wife an income of 160*l.* per annum, Sir WILLIAM GRANT held that, even against general assignees in bankruptcy, she could not have claimed more than actually remained to her beyond the annuity. The particular assignee certainly had not a less extensive right than the general assignees would have had, and therefore Sir W. GRANT was able to come to a decision without determining what would have been the effect of an assignment for value of the whole life-interest. But it is impossible to read what fell from Sir W. GRANT, in that case, without perceiving that the inclination of his opinion was against the right of the wife and in favour of the particular assignee for value.

The question arose next in the case of *Elliott v. Cordell*, (b) before Sir J. LEACH. There the wife had a life-interest in a sum of 9000*l.* 3*l.* per cents, standing in the names of trustees. She joined her husband in a sale and assignment of her whole interest, and her husband having afterwards become bankrupt, she filed her bill to set aside the sale. It was alleged that the sale was fraudulent; but this allegation was not established in evidence, and the

(a) 11 Ves. 12.

(b) 5 Madd. 149.

only question ultimately argued was, whether, notwithstanding the sale and assignment by her husband (for her concurrence was of course of no avail), she was not entitled to the whole, or a portion at least, of the dividends, when by the bankruptcy of her husband she was left destitute. Sir J. LEACH, after taking time to consider \* the question, decided against her alleged equity \* 868 and in favour of the particular assignee for value.

The same point again came before Lord BROUGHAM, ten years later, in *Stanton v. Hall*. (a) There the husband was tenant for life, with a provision, however, that, in the event of his bankruptcy or insolvency, his wife should have an annuity of 100*l.* during his life. The husband sold and conveyed the whole estate as if he had been the owner in fee-simple; he afterwards became insolvent and took the benefit of the Insolvent Act, so that the right of the wife to the annuity of 100*l.* accrued. It was, however, held, that the sale and conveyance by the husband of the whole estate as if he had been owner of the fee in fact included an assignment of the wife's interest in the 100*l.* per annum, and that she had no equity against the petitioner. This was a very strong case indeed, inasmuch as the wife's interest at the time of the husband's assignment, or rather his conveyance of the fee, was contingent and reversionary. Still the wife's right was held to have been altogether defeated by the act of her husband.

I am not aware of any other cases in which this precise point has arisen; and the question is, whether they afford a rule on which this Court ought to act.

It is now clearly settled that a purchaser for value from the husband of his wife's *chose in action*, to the *corpus* of which she is entitled, is in no better situation than the husband himself; on what grounds is it that the Court does not apply the same rule where the subject-matter of the sale is a life-interest only? I take \* them to be these. Where the interest sought to be \* 869 recovered through the aid of this Court is absolute, the Court, though enforcing against the husband what is called the wife's equity, acts in truth for the benefit and with a view to the interests not of her only, but also of her children. It deals with the fund in analogy to what a prudent parent would probably have done in giving a portion to a daughter; and the doctrine having

been acted on for centuries (I am guilty of no exaggeration in the use of the word), no purchaser from the husband can be deceived or mistaken as to how his rights will be dealt with here. There is no doubt or ambiguity. He knows that the fund is the fund of a married woman, and that relation alone, without more, gives rise to her rights, and through her to the rights of her children, in this Court. If, therefore, he by contract puts himself in the place of the husband, he cannot complain that he should be in no better position than the person to whose rights he succeeds.

The case is not the same where the Court has to deal with a mere life-interest. No provision in such a case can be made for children. The question then is one exclusively between the husband and the wife. In directing a settlement of a wife's fortune, the Court never (assuming that there is no misconduct in the husband) deprives him of the income of the fund. It is his duty to maintain the wife, and to enable him to do so this Court follows the course of the common law, and gives him a right to what, but for the marriage, would be the natural fund for supporting the wife.

By the marriage, and the duty thereby entered into of maintaining her, he becomes a purchaser of what is reasonably and naturally applicable towards enabling him to perform his duty. It is \* 870 true, that if he fails in \* the discharge of that duty, if he deserts his wife and ceases to maintain her, this Court will not help him to get at the fund which he can only reach through its process without securing for the wife a portion of his income. But this is done not by reason only of the relation resulting from the marriage, but because the husband has failed to perform the duties under which he had brought himself: it is an equity enforced in favour of the wife arising from her husband's misconduct.

Now to involve third persons in questions as to how far the husband has or has not duly maintained his wife would, it has been thought, be inexpedient, and might give rise to discussions irritating and unseemly. It may happen that a husband, duly maintaining his wife, may for their common advantage reasonably sell her life income, and it would be strange that the purchaser's title should afterwards be defeated by the subsequent misconduct of the husband in not maintaining his wife.

If by having deserted her he had given her a right against the purchaser, what would be the consequence of his again duly dis-

charging his marital obligations and adequately supporting her? Would the purchaser's right revive in such a case? If so, a door would be opened to endless discussions. If not, then this anomaly would arise, that the husband by his own mere misconduct could defeat his own sale. These are the grounds, or some of the grounds, on which I conceive the distinction in principle between the mode of dealing with the purchaser of a wife's life-interest and the purchaser of her absolute interest may be supposed to rest. That they are altogether satisfactory to my mind I am not prepared to say; at the same time they are certainly not without weight, and considering that the authorities \*are all one \*871 way, I think it would be very inexpedient now to attempt to disturb them.

The next point with which the order deals is as to the claim for the 290l., being arrears of income in the hands of the receiver, which had accrued between Michaelmas, 1850, and Michaelmas, 1851. The petitioner argued that this was to be considered as a *chose in action* of the wife not reduced into possession by her husband in his lifetime, and so now belonging to and receivable by her and not by those claiming under him. But this claim cannot be sustained. The sum in question had in substance been reduced into possession. It is true that it had not found its way into the husband's pocket, but he had assigned it over, and the assignee had obtained an order of this Court, under which the receiver was directed to pay it to Mrs. Bassill, one of the incumbrancers. [His Lordship here read the order.] The effect of that order was that the money was held by the receiver under an obligation to pay it to Mrs. Bassill. The money had been specially appropriated, and the receiver was in the nature of an agent for the person entitled by virtue of that appropriation. This was the view taken by the Vice-Chancellor, in which I entirely concur.

The order of the Vice-Chancellor, having thus disposed of all questions as to the income which had accrued due in the lifetime of the husband, goes on to give directions for keeping separate accounts of the income of the freehold, the copyhold, and the personal estate, and then marshals the rents and profits of the freehold and copyhold estates, directing the latter to be applied in the first instance in discharge of the annuity of Messrs. Phillips, whose incumbrance was a first charge on both the freehold and copyhold property, and if the copyhold rents should be insuf-

\* 872 ficient to keep down the annuity, then \* the order directs the freehold rents to be applied in making good the deficiency; subject to this direction, the freehold rents are ordered to be applied in discharge of the premiums and interest payable in respect of Mrs. Bassill's security which affected the freeholds only, and the surplus rents, if any, both of freeholds and copyholds, are ordered to be paid to the petitioner.

The petitioner objects to this arrangement, and contends that this is not a case for marshalling at all, but that the annuity payable to Messrs. Phillips ought to be paid ratably out of the rents of the freeholds and copyholds, and then that the surplus rents of the freeholds ought to be applied as far as they extend to the incumbrance of Mrs. Bassill, which is not charged on the copyholds, and so that the petitioner ought to have the whole surplus of the copyhold rents, after paying, ratably with the freeholds, a due proportion of the annuity, which is the first incumbrance: I cannot discover any ground for the petitioner's argument. The order of the Vice-Chancellor proceeds on the well-established doctrine of this Court, that where two funds are liable to the claim of A., and only one of them to the claim of B., A. shall not, by his choosing to resort to the fund on which alone B. had a claim, prejudice the rights of B. The very case now under consideration, that is, the case of one party being mortgagee of freeholds and copyholds, and another mortgagee of copyholds only, was put by Lord ELDON, in *Aldrich v. Cooper*. (a) I confess that, on this point, I have never entertained a doubt. The order of the Vice-Chancellor was entirely right.

The only remaining question is as to the income of the personal estate. The order directs its application, in the first place, \* 873 towards satisfaction of the premiums on the \* policies of insurance, which the will directs to be kept up, and then the surplus is ordered to be paid to the petitioner. To this the petitioner objects, on the suggestion that the keeping up of the policies was an obligation cast not on the personal estate exclusively, but on the whole mixed income arising from the entire property, real as well as personal, and so that the freeholds and copyholds ought to bear a share of the burden. I am, however, clearly of opinion that this argument is quite untenable. The real

(a) 8 Ves. 382; see p. 395.

estate is, it is true, made liable to the burden ; but the question is not whether the real estate is burdened, but whether the personal estate is to any extent exonerated. The personal estate is the primary fund for payment of legacies, and there is obviously nothing here indicating an intention to relieve it. The case of *Boughton v. Boughton* (a) is decisive on this point. The result therefore is, that the order of the Vice-Chancellor was right in every particular, and the only course, therefore, which I can take is to dismiss this petition with costs.

That a rule should be established and strictly adhered to is in general far more important than that the rule itself should be the very best which could be devised. And here the doctrine, evidently approved by Sir W. GRANT nearly half a century ago, was afterwards acted on by Sir J. LEACH and Lord BROUGHAM, and their decisions were not appealed from. The strong probability is, that trustees have from time to time often acted on the faith of the law thus established, and it would be dangerous to sanction doubts as to the propriety of what may have been so done. The consequence is, that the Vice-Chancellor was right in dismissing the first petition.

I may here observe, that no question is raised as to any \* power of the husband to affect the life-interest of the wife \* 874 after his death, so that the decision of Lord COTTENHAM in *Stiffe v. Everett*, (b) to which it was attempted in argument to liken this case, is clearly inapplicable.

1854. January 11, 16. March 11. April 29.

An annuity duly charged on freeholds was by deed assigned, and by that deed a further security was given by the grantors upon copyholds, in consideration of an additional sum of money paid to the grantors, and the sum payable for redemption was increased in amount. The assignees of the annuity appeared in the memorial to be trustees for other persons, but the trust was not disclosed on the deed of assignment. *Held*, that the deed of assignment, so far as it affected the copyholds and so far as it contained any alteration of the term on which the original annuity was granted, was void, but that it was valid as an assignment of the original annuity.

*Bolton v. Williams*, 2 Ves. Jr. 138, observed upon.

After the petition of appeal had been heard by the Lord Chancellor, but before his Lordship had delivered his judgment, it was

(a) 1 H. L. Cas. 406.

(b) 1 M. & C. 37.

discovered, upon looking at the memorial of the annuity assigned by H. Blegborough to H. and J. Phillips, that they were not the grantees beneficially entitled to the annuity, but that they were trustees for Mr. and Mrs. Tipping, who were not parties to the deed of assignment; it was also ascertained, by reference to the deed of assignment, that the transaction in question was not a mere assignment, a further sum being fixed for the redemption of the annuity, and an additional sum having been received by Mr. and Mrs. Tidd. Soon after these facts were brought to the notice of Mrs. E. Tidd, a notice was left at the Lord Chancellor's begging his Lordship not to dispose of the case finally, without permitting Mrs. E. Tidd to be heard on the invalidity of the security, so far as it affected the copyholds.

After the judgment was delivered, the Solicitor-General stated that there had been as yet no proof by the Messrs. Phillips \* 875 of the validity of their security \* against the copyholds; that the Vice-Chancellor's judgment, which had been just confirmed, rested on the assumption that the annuity was effectually charged on the copyholds, but that he had expressly stated if there was any question as to the validity of the security it must be verified by affidavit. (a) After some discussion, it was arranged that the case should stand over to enable the Messrs. Phillips to produce such evidence as would be sufficient to show that their security did include the copyholds.

For the purpose of understanding the point now to be raised, it will be necessary to state that, on the 6th May, 1822, an order was made in the suit of *Tidd v. Lister* (which was an administration suit), directing the receiver in that suit to pay the plaintiffs, Mr. and Mrs. Elizabeth Tidd, the surplus income of the estate of the testator Josiah Lister, after providing for certain payments made by the will. By an order dated 18th January, 1834, made in the same suit, after such previous payments the receiver was ordered to pay to Henry Blegborough, out of the rents, profits, and dividends of the real and personal estate of the testator, an annuity of 127l. 10s., which had, by deeds of lease and release, dated September, 1820, and by a fine conveying the life-interest of Elizabeth Tidd in the freeholds, been duly secured to H. Blegborough by Mr. and Mrs. Tidd. By an indenture bearing date 1st November,

(a) See 10 Hare, p. 158.

1834, and indorsed on the indenture of September, 1820, and made between Henry Blegborough, Mr. and Mrs. Tidd, and Henry and James Phillips, the annuity of 127*l.* 10*s.*, with all securities for the same, was duly assigned to H. and J. Phillips, and the life-estate of Mrs. Elizabeth Tidd, in the copyholds of the testator, was conveyed and assured to a trustee \* for H. and \* 876 J. Phillips for further securing the annuity. The deed recited that H. Blegborough had, in consideration of 1000*l.*, agreed to assign the annuity of 127*l.* 10*s.*; and that Mr. and Mrs. Tidd had, in consideration of the further sum of 196*l.* to be paid to them by H. and J. Phillips, agreed to ratify and confirm the assignment. By an order dated 18th January, 1834, the receiver was directed to pay H. Blegborough his annuity out of the rents and profits of the estate; and, on the 1st November, 1834, an order was made directing payment of the annuity to Messrs. Phillips instead of to H. Blegborough. Some time afterwards, Mrs. Elizabeth Tidd's life-interest in the freehold estates of the testator was charged by deed and fine with the sum of 2100*l.* in favour of Mrs. Mary Tidd. By an order in the same suit, in March, 1834, the receiver was directed, after the payments previously directed, to pay the interest on that sum and the premiums on the policy on Elizabeth Tidd's life to Mary Bassill, who afterwards became entitled to this security, and a similar order was made in her favour.

On the 16th January, 1854, the question came on to be argued solely with reference to the invalidity of the deed of the 1st November, 1834, so far as it affected to charge Mrs. Elizabeth Tidd's life-interest in the copyholds.

*The Solicitor-General* and *Mr. Leach*, for Mrs. Elizabeth Tidd. — The annuity deed under which Messrs. Phillips claim is invalid, not being in conformity with the fourth section of the Annuity Act (53 Geo. 3, c. 141), which enacts, “that in every deed, bond, instrument, or other assurance whereby any annuity or rent-charge shall from and after the passing of this Act be granted or attempted to be granted for one or more life or lives, or for any term of years or greater estate determinable on one or \* more life or lives where the person or persons to whom \* 877 such annuity shall be granted or secured to be paid, shall not be entitled thereto beneficially, the name or names of the person or persons who is or are intended to take the annuity



beneficially shall be described in such or the like manner as is hereinbefore required in the enrolment, otherwise every such deed, instrument, or other assurance shall be null and void." The difference between this Act and the former Annuity Act (17 Geo. 3, c. 26) was this, that whereas the old Act only applied to grants of annuities, the subsequent Act introduces the words "secured to be paid," which will clearly involve the necessity of enrolling such a security as this, which ratifies and confirms the annuity to a different person and upon different terms of redemption. It is enough for us to show that the beneficial owners of the annuity are not the same persons as appear on the face of the deed to be the owners. The deed of assignment in the present case does not correctly state the facts of the real annuity granted; it professes to be granted to persons to whom in truth it was not granted. *Hood v. Burlton*, (a) *Denn v. Dolman*, (b) *Hoffman v. Cooke* (c). It will be contended that in fact the second annuity was not a new annuity, but a mere assignment of a previously existing annuity; but granting that a mere assignment of an annuity by the annuitant need not be enrolled, yet, where the grantor is a party and the assurance is as it were confirmed, such a transaction must be enrolled. *Duke of Bolton v. Williams*. (d) With reference to the necessity of enrolment in such a case, Lord Commissioner EYRE, in the case of *Hood v. Burlton*, (e) observes: "It is manifestly the object of the Act to comprehend all manner \* 878 \* of instruments calculated to secure the payment of an annuity. Though the language is, 'whereby an annuity shall be granted,' yet the construction ought to be, whereby it shall be in any manner secured to be paid; and therefore if the Court thinks this an instrument whereby an annuity is secured to be paid, however it has been granted, all those instruments must be within the Act; or there is an end of it." On this principle a bond given by a third person to secure an annuity must be registered. *Rosher v. Hurdiss*. (g) In *Earle v. Browne*, (h) Mr. Justice LITTLEDALE observed: "The alteration of an annuity requires enrolment just as much as the original grant;" in that case,

(a) 2 Ves. Jr. 29.

(c) 5 Ves. 623.

(b) 5 T. R. 641.

(d) 2 Ves. Jr. 138; S. C., 4 Bro. C. C. 297.

(e) 2 Ves. Jr. 29; see p. 34.

(h) 10 A. & E. 412; see p. 416.

(g) 5 T. R. 678.

the substituted annuity was of less amount than the original one, and the grantor covenanted that in consideration of the grantee's acceptance of the reduced annuity not to redeem for five years, and it was provided that the securities for the former annuity should be securities for the new one. The order of November, 1884, relied on by Messrs. Phillips, was obtained on a misrepresentation as to the identity of the annuity, and the order was void so far as Mrs. Tidd was concerned, having been obtained in the lifetime of her husband, nor is she liable in respect of any advances by the annuitant: *Angell v. Hadden*, (a) *Jones v. Harris*, (b) *Frank v. Frank*; (c) under these circumstances no binding order can be made as against the copyholds, nor indeed will this Court sanction any order against the freeholds, though as the petition by a slip has admitted that the freeholds are rightly charged, it may not be competent for the petitioner to complain as to them. It is submitted, however, that the fund, being in possession of the receiver of the Court, will not be parted with except \* to \* 879 the rightful owner: and, the transaction being void, no confirmation can make it valid: *Bromley v. Holland*; (d) nor is it, under such circumstances, necessary to file a bill to set it aside. *Ex parte Shaw*. (e) [They also referred to *Gorton v. Champneys*. (g)]

*Mr. Rolt* and *Mr. Eddis*, for Mrs. Bassill, submitted that the objection as to the validity of the annuity was equally applicable to the freehold as to the copyhold property, and that the deed must be declared entirely void. They referred to *Hammond v. Foster* (h) and *Humphreys v. Jenkinson*. (i)

*Mr. Walker* and *Mr. Hardy*, for Messrs. Phillips. — So far from Mrs. Tidd not being concluded by the order of 1884, she has not only not repudiated it, but has adopted and confirmed it by admitting its validity as to the freeholds; she cannot therefore be permitted to assert its invalidity in any way. *Roberts v. Madocks*. (k) The judgment of this Court being pronounced, the order ought to be

(a) 2 Mer. 169.

(b) 9 Ves. 486.

(c) 3 M. & C. 171.

(d) Cooper 9; S. C., 5 Ves. 610; 7 Ves. 3.

(e) 5 Ves. 620.

(g) 1 Bing. 287.

(h) 5 T. R. 635.

(i) 8 Exch. 684.

(k) 18 Sim. 549.

drawn up without imposing any terms upon us to show that the annuity was duly enrolled; it is not for us to invalidate our own title, but for the party impugning the transaction to prove the defect if it exists: *Doe v. Bingham*; (a) and such defect being neither alleged nor alluded to in the pleadings, no advantage can now be taken of it in this form of proceeding. *Dunn v. Calcraft*. (b) The deed of November, 1834, alone can be looked at to see the effect of the transaction; it was clearly an assignment \* 880 and not a new grant of an annuity \* within the meaning of the Act, which was directed to the protection of grants only of annuities, and being an assignment merely it did not require enrolment: *Bromley v. Greathead*, (c) *Dixon v. Birch*, (d) *Browne v. Like*, (e) *Nield v. Smith*; (g) but assuming for a moment that the transaction amounted to a grant of a new annuity requiring enrolment, and that the enrolment was defective as to the copyholds, nevertheless the grantees will be remitted to the position of their assignor under the deed of 1820, and, *quoad* the freeholds, the annuity will be valid and subsisting. *Browne v. Rose*, (h) in which case GIBBS, C. J., says: "Though it was held in the case of *The Duke of Bolton v. Williams* that a defect in one of the instruments affected all, we cannot think that such was the intent of the legislature. We think it was only meant that the want of prescribed observances should vitiate the particular security." By the deed of assignment Mrs. Tidd is bound as to her reversionary interest, nor can extrinsic circumstances be permitted to affect or control the legal import of the instrument. *Irnham v. Child*, (i) *Squire v. Campbell*, (k) *Marriage v. Marriage*. (l) The annuity assigned is precisely the same as that originally granted, the only difference is that there is an increased amount payable for redemption, but that would not render enrolment necessary: *Booth v. Druce*; (m) nor would the fact that the copyholds had been added as further security render a new memorial necessary. *Ex parte Price*, (n) *Aston v. Gwinnell*, (o) *Doe v. Ste-*

(a) 4 B. & A. 672.

(b) 2 S. & S. 56.

(c) Cited from MSS. in Hunt on the Annuity Act, p. 45.

(d) 2 H. Black. 307.

(k) 1 M. & C. 459.

(e) 14 Ves. 302.

(l) 1 C. B. 761.

(g) 14 Ves. 491.

(m) 4 Taunt. 252.

(h) 6 Taunt. 124; see p. 139.

(n) 3 Madd. 132.

(i) 1 Bro. C. C. 92.

(o) 3 Y. & J. 136.

*phens.* (a) It was said that the grantors of the annuity \* having joined in the deed of 1834 made it a new transac- \* 881 tion, and therefore that it ought to have been enrolled; but the motive which induces a party to act must give colour to the transaction. *Roe v. Archbishop of York.* (b) Thus, if it were to be regarded as a new transaction, Mr. and Mrs. Tidd would have defeated their own object, for it is clear they did not intend to grant a second annuity; and the only reason why Mrs. Tidd was made a party, was that the further security on the copyholds could not have been added without her concurrence.

*The Solicitor-General*, in reply. — The orders made for the payment of the annuity in the suit of *Tidd v. Lister* are not binding on Mrs. Tidd, the suit being the suit of her husband. *Turner v. Turner.* (c)

The Lord Chancellor, at the conclusion of the argument, observed that he was clearly of opinion that the Vice-Chancellor, upon the facts before him, was perfectly right; that, with respect to the orders of June and November, 1834, he did not think the petitioner was concluded by them, as they were merely interlocutory orders reciting the payment and directing the continuance of the annuity. His Lordship added that it became very material to consider whether the question just argued, and founded on matter discovered since the appeal was prosecuted, was properly raised on this petition.

April 29.

THE LORD CHANCELLOR. — This case, which from various causes has been before \* the Court an extraordinary length \* 882 of time, was, as I supposed, finally argued before me just this time twelve months; but before I was prepared to give my judgment, an application was made to me to delay doing so, on the suggestion that some material facts had been discovered which were not properly brought before either the Vice-Chancellor or myself, and which might influence my decision. In consequence of that, I then abstained from pronouncing my decision, and judgment was not given until after the long vacation. In December last, as I then thought, I finally disposed of this case, by substan-

(a) 1 Price, 38.

(b) 6 East, 86.

(c) 2 De G., M. & G. 28.

tially dismissing the petition of appeal, and entirely confirming the judgment of the Lord Justice TURNER when he was Vice-Chancellor. Immediately, however, after my judgment was pronounced, and before the order was drawn up, the same suggestion to which I have already alluded was again made.

It is quite unnecessary that I should go into the whole facts of this case; they have already been adverted to in my previous judgment, and therefore I shall only allude to them so far as they give rise to this new question.

[His Lordship here shortly stated these facts, and proceeded:—]

One of the subjects of appeal being as to the right of Mrs. Bassill, whose annuity was secured upon the freeholds only, to compel the Messrs. Phillips to have recourse to the rents of the copyholds in the first instance before resorting to the freeholds, I concurred with the Vice-Chancellor in thinking that Mrs. Bassill had such right. The Vice-Chancellor, in giving his judgment, said: "I am satisfied that the decision in *Aldrich v. Cooper* is not affected by the subsequent cases; and I am of opinion, that, assuming \* 883 the security of the Phillips's to be \* a good security on the copyhold property (which if there be any question must be verified by affidavit) there must be a marshalling." When this matter was before me, after I had disposed of the appeal, it was suggested that in truth there was no valid charge upon the copyholds. The doubt on that subject had originally been of this nature, that there had been by the deed of 1834 no actual surrender of the copyholds when the annuity was transferred from Dr. Blegborough to the Messrs. Phillips; but, on investigating the matter, that turned out to be an unfounded suggestion, because the interest in the copyholds was a mere equitable interest, which could be charged only by a deed, and in that mode it was effectually charged, inasmuch as Mrs. Tidd was separately examined, and was a party to the deed giving the additional security on the transfer of the annuity. In the investigation of that matter, however, a new objection was discovered which, though not before adverted to, was alleged to affect the validity of the security altogether. [His Lordship here referred to the provisions of the deed of assignment, and to the fourth section of the Act 53 Geo. 3, c. 141.] Now it was said that the deed of 1834 was a deed whereby

an annuity was granted or secured to be paid, and that the names of the parties entitled beneficially were not stated on the face of that deed. I confess I think that is a valid objection. All such objections under the Annuity Acts (considering that annuities are not now regarded in the light in which they used to be regarded sixty or seventy years ago) are objections which, to my mind at least, it is unsatisfactory to sustain ; but at the same time I have no right to alter or to make myself wiser than the law, and the law has said that it is a necessary ingredient to the validity of an annuity deed that it should disclose \*the names of the per- \* 884 sons beneficially entitled. I need hardly observe, that, in my opinion, the deed of November, 1834, was clearly a deed whereby an annuity was granted or secured within the meaning of the fourth section of the 53 Geo. 3, c. 141, because, although it is the same annuity in amount as that which had existed before, yet it is substantially a different annuity, being redeemable on the payment of a different sum of money. The character of it, therefore, is entirely altered, and looking to the object of the statute I think that it is a new annuity. I should have arrived at this conclusion, even if there had been no authority, but I think the authority to which I was referred of *Earle v. Browne* (a) is decisive on that subject. It is true that in that case the new annuity was different, being reduced in amount ; but the principle of that case applies *a fortiori* to the present. I think, therefore, the objection is well founded, and that the deed of 1834 is void, because the names of the persons beneficially interested are not disclosed on the face of the instrument.

Such being the view taken by Mrs. Tidd, she asks, among other things, that the rents of the copyhold property may be ordered to be paid to her, and, in substance, that these rents may be withdrawn from all claimants except herself ; that, she having succeeded as tenant for life of the copyhold property, it may be treated as property in which she alone has an interest. I think, for the reasons I have stated, that that is the right view of the case, and that she is so entitled.

But then there is raised another question on which I have had some doubt. Mrs. Bassill says, although \*that is all \* 885 Mrs. Tidd asks, yet if such relief is given to Mrs. Tidd,

something more must be provided for, because she (Mrs. Bassill) has an interest in contending that the whole deed is void, and that Messrs. Phillips have no security at all for their annuity ; so that her annuity comes in as the first instead of the second incumbrance on the freehold property. I have turned this a good deal in my mind, but I cannot concur in that view of the case. When it is said that the deed of assignment is void under the statute, I think that that must be taken with a qualification. It was formerly thought, and particularly by Lord LOUGHBOROUGH (who, if one may venture so to speak of such a high authority, seems to me sometimes to have been running wild in his zeal to set aside annuities), that every transfer of an annuity required to be memorialized. He says so in terms, and he so decided in the case of *Duke of Bolton v. Williams*, (a) which was not exactly but nearly the same case as the present: in that case he distinctly gave as the reason why the new annuitant (who had taken an assignment of two annuities, and some new terms being also introduced as to the redemption) could not set up the assignment from the two former annuitants, that every assignment of an annuity required to be memorialized as well as the original grant, because he said, "It must appear by the registry, who is the real owner, and beneficially entitled to the annuity." The statute, however, has said nothing of the sort; and it is quite clear that his Lordship's view is incorrect. In the subsequent case of *Dixon v. Birch*, (b) in the Common Pleas, before the Lord Chief Justice EYRE, followed by *Bromley v.*

*Greathead*, in the Exchequer, before Lord KENYON, mentioned in a note to *Dixon v. Birch*, both those learned

Judges held that Lord LOUGHBOROUGH's was an erroneous view, and that the statute did not say that a person who had an annuity properly granted could not legally assign it without its being memorialized. That doctrine, so laid down by both Courts, has, I believe, been understood and acted upon ever since.

It is possible that Lord LOUGHBOROUGH's decision in the case of *Duke of Bolton v. Williams* may be sound, notwithstanding the subsequent decisions in *Dixon v. Birch* and *Bromley v. Greathead*, to the effect that the mere assignment of an annuity does not require to be memorialized; for in the case of *Duke of Bolton v. Williams* it was not simply the assignment of an annuity, but it

(a) 2 Ves. Jr. 138.

(b) 2 H. Black. 307.

was the assignment of two separate annuities, so as to merge them together, making them one new annuity of the same amount, I do not say I should have thought this a very reasonable distinction, but it may constitute a distinction. If it does not, I can only say I see nothing in the statute requiring the assignment of an annuity to be memorialized, and the two cases to which I have just referred, clearly support my conclusion. Now, if that be the correct view of the case, what is the effect of the statute in saying, with reference to the particular deed in question, that that deed should be void? In the present case, the original annuitant, Dr. Blegborough, having a perfectly valid annuity of 127*l.* 10*s.* for the life of Mrs. Tidd, in consideration of 1000*l.* paid to him by the Messrs. Phillips, assigned that annuity to them. Suppose that this had been done by a separate deed, I have not the least doubt that it would have been a perfectly valid deed, and that the Messrs. Phillips would have had it independently of the Annuity Acts. No memorial then being necessary, the circumstance \* that they were trustees is immaterial, because the same \* 887 principle which shows that the memorial is not necessary, also shows that the fourth section of the Act 53 Geo. 3, c. 141, does not apply. The assignment would have been valid whether it stated Messrs. Phillips as trustees or not; it was, like any other assignment, unaffected by the Annuity Act. What further took place was this: the Messrs. Phillips, finding the security a beneficial one, agreed to give Mr. and Mrs. Tidd nearly 200*l.* more upon the occasion of the assignment; and Mr. and Mrs. Tidd agreed that the annuity should not be redeemable except on payment of the additional sum. I have already stated that I think the alteration of the sums payable for redemption constituted it a new transaction. But suppose that the transaction had been effected by two deeds instead of one, there is no doubt that the agreement to alter the terms of redemption would not have invalidated the former annuity, which would have remained untouched. I know that doctrine was disputed in the argument on the authority of *Earle v. Browne*. (a) That case, I must say, is not to my mind entirely satisfactory, because, as I understand it, the Court there went further in setting aside the deeds than they were authorized to do, even supposing their decision as to the transaction to have



been right. This it may have been ; but I do not think that it at all necessarily governs the present case. In that case there was not only a change in the terms of the redemption of the annuity, but the original annuity was destroyed, and a new annuity was substituted for it ; the original annuity was an annuity of 180*l.* a year, redeemable at a certain time : the annuity was altered from 180*l.* a year to a smaller annuity, and the terms of \* 888 \* redemption were also altered, and the Court of Queen's

Bench came to the conclusion that to hold that not to be a new transaction would be to enable a person to defeat the Annuity Act altogether ; and treating it as a new annuity they decided that the consequences of its not being properly enrolled must therefore attach. That is not the case here, because in this case, although the transaction in question was effected by the same deed, it was in truth merely an assignment by Dr. Blegborough of an annuity which was duly enrolled ; and then an abortive attempt to substitute a new annuity for the one previously existing. Upon principle, therefore, I think that although the statute may say that a deed under such circumstances is void, yet that does not mean it is absolutely null and void to all intents and purposes. I think I am entitled to apply that principle to a case like the present, and to hold that the transaction is only void as between the grantor and grantee, and not void as to any collateral matter, and that the assignment of the old annuity, which is irrespective of the provisions of the statute, must be regarded as a transaction independently of the grant of that annuity.

I am of opinion, therefore, that the deed of 1834, although void so far as it altered any of the terms of the previously existing annuity, is not void so far as it puts the Messrs. Phillips in the place of Dr. Blegborough. I think that is the legal construction. Even if it were not so, and it were to be treated as wholly void, still, as there is no doubt that there was a valid contract between Messrs. Phillips and Dr. Blegborough, for the purchase of the annuity and the payment of 1000*l.*, I think that the Messrs.

Phillips are entitled to stand in the place of Dr. Blegborough, \* 889 and that for their annuity \* of 127*l.* 10*s.* they have a valid charge on the freehold property, but that they have no charge at all upon the copyholds. The consequence is, that the order of the Vice-Chancellor must be altered accordingly.

His Lordship added that the original petition of appeal of Mrs.

Tidd having been dismissed with costs, she had been let in somewhat irregularly to raise the question now decided in her favour, but that this course was sanctioned solely with the view of saving expense; that the result therefore would be, that Mrs. Tidd must pay all the costs of her petition, except so far as those costs had been occasioned by the affidavits filed subsequently to the date of the judgment in December last; that Mrs. Tidd could not herself claim any costs, but that Messrs. Phillips and Mrs. Bassill would be entitled to add their costs to their respective securities.

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\* KING v. HEENAN.

\* 890

1853. March 10. Before the LORDS JUSTICES.

A mortgagor and a mortgagee with a power of sale joined in demising the mortgaged hereditaments to a receiver upon trust at the request of the mortgagee during the continuance of the security, and at the request of the mortgagor, after satisfaction of the sums secured, to grant leases of the premises in such manner as the person making such request should appoint, but to permit the mortgagor to receive the rents until default was made in payment of the mortgage-money or interest, and upon trust after default to receive the rents and apply the same in keeping down the interest upon the mortgage. These trusts were not declared to be subject to the power of sale in the mortgage: *Held*, that they were so in effect, and that the receiver was bound without the concurrence of the mortgagor to join in conveying the hereditaments to a purchaser from the mortgagee under the power of sale.

THIS was a special case stated for the opinion of the Court to determine whether the defendant, who was a trustee and receiver, was bound to concur in a conveyance to a purchaser under a power of sale in a mortgage.

On the 7th of November, 1827, Richard Gutteridge surrendered certain copyhold hereditaments to Samuel Vines and Thomas Osbaldiston, their heirs and assigns, to secure the repayment of 1200*l.* and interest. Simultaneously with the surrender, a deed of covenant, dated the 7th of November, 1827, was made between Richard Gutteridge of the one part, and Samuel Vines and Thomas Osbaldiston of the other part, whereby it was declared and agreed that if default should be made in payment of the 1200*l.* and inter-

[ 691 ]

est, or any part of the same respectively, at the time and in manner in the surrender mentioned and appointed for payment thereof, it should be lawful for Samuel Vines and Thomas Osbaldiston and their heirs or assigns, and they and he were thereby expressly authorized at any time or times thereafter, without any further authority from Richard Gutteridge, his heirs or assigns for that purpose, and without prejudice to any other remedy he or they might be entitled to for recovery of the said principal money and interest, or to the right of foreclosing the mortgaged \* 891 premises, absolutely to sell and dispose of the said pieces \* or parcels of land, hereditaments, and premises, and every or any part thereof with their appurtenances, either by public auction or private contract in one lot, or in separate lots at their or his discretion, and to surrender, convey, and assure the hereditaments sold to the purchaser or respective purchasers thereof, his, her, or their heirs, executors, administrators, or assigns, or as he or they respectively should direct or appoint freed and absolutely discharged of and from all right and equity of redemption whatsoever, of or by him, Richard Gutteridge, or his heirs, or any person or persons claiming or to claim from, through, or under him or them.

Thomas Osbaldiston died in the month of March, 1837, and the mortgage was transferred to Sarah Frances Rice by an indenture dated the 30th of April, 1841, whereby a further charge was also created in favour of one Edward Rice.

By an indenture dated the 20th of August, 1841, and made between Sarah Frances Rice of the first part, Edward Rice of the second part, Richard Gutteridge of the third part, and the defendant James Heenan of the fourth part, after reciting the above-mentioned mortgage and further charge that Richard Gutteridge had entered into the agreements therein mentioned for letting or demising certain parts of the mortgaged premises upon the terms and in manner therein mentioned, and that it might be found expedient from time to time to let or demise other parts of the said premises; and further reciting that for the purpose of facilitating the letting and demising of the said premises or any part or parts thereof, and also for the purpose of better securing the regular payment of the interest of all the said principal moneys secured, as thereinbefore recited, it had been agreed between Richard Gutteridge, Sarah Frances \* Rice, and Edward Rice, that the

premises should be vested in James Heenan for the term of twenty-one years, upon the trusts thereafter declared of the same; and that James Heenan, his executors, administrators, and assigns, should be invested with such power and authorities, as were thereafter expressed, as receiver and receivers of the rents and profits of the said premises; and after further reciting that a license had been obtained from the lord of the manor empowering Sarah Frances Rice and Richard Gutteridge to demise the premises in manner and for the term thereafter mentioned, it was witnessed that Sarah Frances Rice, with the privity and approbation of Richard Gutteridge and Edward Rice, demised the premises unto James Heenan, his executors, administrators, and assigns, for the term of twenty-one years, commencing from the 24th of June, 1840, without impeachment of waste, upon trust that James Heenan, his executors, administrators, and assigns, should from time to time thereafter, at the request and by the direction of Sarah F. Rice, her executors, administrators, and assigns, during the continuance of the said several securities then vested in her as thereinbefore stated or any of them, and after full satisfaction and discharge of the same several securities, then at the request and by the direction of Edward Rice, his executors, administrators, or assigns, during the continuance of the security then vested in him as thereinbefore stated, and after the full discharge and satisfaction of all the said several securities, then at the request and by the direction of Richard Gutteridge, his heirs or assigns, demise and lease to the persons or person for the time being, entitled under the said several agreements thereinbefore mentioned or any of them, or to any other person or persons whomsoever, any part or parts of the said premises for all or any \* part of the then unexpired residue of the term of \* 893 twenty-one years, upon such terms and in such manner as the person or persons making such requests and giving such directions as aforesaid should respectively appoint, and upon further trust that until default should be made in payment to Sarah F. Rice,\*her executors, administrators, or assigns of the interest to become due upon the several mortgage debts therein mentioned, James Heenan, his executors, administrators, and assigns, should permit Richard Gutteridge, his heirs and assigns, to receive and take the rents and profits of the said premises for his and their own benefit; and upon further trust, that in case any such default

in payment should be so made, then, and in any such case, James Heenan, his executors, administrators, and assigns, should thenceforth, from time to time, during the continuance of the said several securities, or any of them, collect and receive all and singular the rents and profits of the said premises from the then present and future lessees, tenants, and occupiers of the said premises, and other the person or persons who should be liable to pay the rents and profits thereof respectively, when and as the same respectively should become due. The deed then purported to empower the defendant to collect the rents and do all such acts as the mortgagor and mortgagees could have done. And it declared that the defendant, his executors, administrators, and assigns, should stand possessed of the rents and profits which should be collected or received by him or them respectively, upon trust from time to time, in the first place, to pay thereout all taxes, rates, assessments, and impositions which then were or should thereafter be payable in respect of the same premises, and which the respective lessees, tenants, or occupiers thereof should not be liable to pay, and in the next place, to deduct and retain thereout for his and \* 894 their own benefit a reasonable compensation for \* his and their trouble and expense in collecting, receiving, and recovering, and applying the said rents and profits respectively, not exceeding one shilling in the pound upon all moneys to be so collected and received; and in the next place, to pay thereout to Sarah F. Rice, her executors, administrators, or assigns, the interest to become due on her mortgage debt; and, in the next place, to pay thereout to Edward Rice, his executors, administrators, or assigns, the interest to become due on his debts; and in the last place to pay all the residue or surplus (if any) of the said rents and profits after answering and satisfying the trusts and purposes aforesaid to Richard Gutteridge, his executors, administrators, or assigns.

In the year 1843, default having been made in payment to Sarah F. Rice of the interest on her several securities, the defendant under the powers and authorities given to him as aforesaid entered into and had ever since been in receipt of the rents and profits of the said premises.

Sarah F. Rice had died, and Henry Edridge Rice, her nephew and heir-at-law and customary heir, had been admitted.

Sales had been made under the trust contained in the mortgage,

and all the purchasers (except one) had accepted the title to their several lots purchased by them, and were willing to complete their purchases provided the defendant would, upon completion thereof, surrender or assign to them, or as they might direct, their several lots for all the residue of the term vested in him. Requests had been made to him by the plaintiff (who was the executor of Mrs. Sarah F. Rice) to make such surrenders or assignments accordingly, but the defendant refused so to do without either the direction of the Court or the concurrence of \* the several \* 895 persons interested in the equity of redemption, on the ground that he had been advised by counsel that it was very doubtful whether the effect of the indenture of the 20th of August, 1841, was not to destroy, or at all events to suspend during the term thereby created, the power of sale given to Sarah F. Rice by the indenture of the 30th of April, 1841.

The questions for the opinion of the Court were : —

Whether the power of sale given to or vested in Sarah F. Rice, by the indenture of the 30th of April, 1841, was or not destroyed or suspended by the indenture of the 20th of August, 1841.

And whether the defendant was bound, without the concurrence of any of the persons interested in the equity of redemption of the premises bought by the said purchasers respectively, to assign or dispose of the same respectively for all the residue of the term of years in such manner as they respectively, on the completion of their respective purchases, might require.

*Mr. Malins* and *Mr. Surrage*, for the plaintiff, were not required to address the Court.

*Mr. Chandless* and *Mr. Goodeve*, for the defendant, contended that the deed of the 20th August, 1841, was not merely an appointment of a receiver on behalf of a mortgagor and mortgagee, but was made for the purpose of carrying into effect a general scheme of letting which could not be determined without the assent of the mortgagor. There was nothing in the deed determining those trusts at the will of either of the parties alone. If it had been intended to preserve the power of sale, some words expressing such an intention would \* have been in- \* 896 troduced. At all events *Mr. Heenan* could not safely act upon a mere private opinion.

300 CASES IN CHANCERY.

Their Lordships held that the power of sale was not affected by the provisions of the deed of the 20th of August, 1841, and that the defendant was bound to concur in the assurance to the purchasers.

## BURGESS v. BURGESS.

1853. March 17.

Where a person is selling an article in his own name, fraud must be shown to constitute a case for restraining him from so doing on the ground that the name is one in which another has long been selling a similar article.<sup>1</sup>

Therefore, where a father had for many years exclusively sold an article under the title of "Burgess's Essence of Anchovies," the Court would not restrain his son from selling a similar article under that name, no fraud being proved.<sup>2</sup> Delay from October to March in appealing from the refusal of a motion for an injunction held fatal to the appeal.

THIS was a motion by way of appeal from the decision of Vice-Chancellor KINDERSLEY refusing an injunction to restrain the defendant, his workmen, servants, and agents, from selling or disposing of, or causing or procuring to be sold or disposed of, any

<sup>1</sup> See 2 Story Eq. Jur. § 951 *b*; *Rodgers v. Nowill*, *ante*, 618, and cases cited in the note; *Franks v. Weaver*, 10 Beav. 297; *Holloway v. Holloway*, 13 Beav. 209; *Shrimpton v. Laight*, 18 Beav. 164; *Moet v. Couston*, 33 Beav. 578; *Farina v. Silverlock*, 6 De G., M. & G. 214 and notes; 4 K. & J. 650; *Brooklyn White Lead Co. v. Masury*, 25 Barb. (N. Y.) 416; *Taylor v. Carpenter*, 3 Story, 458; S. C., 2 Sandf. Ch. 603; 11 Paige, 292; *Leather Cloth Co. v. Lorsont*, L. R. 9 Eq. 345, 352; *Maxwell v. Hogg*, L. R. 2 Ch. Ap. 307, 314, 318; *Seixo v. Provezende*, L. R. 1 Eq. 192; 2 Dan. Ch. Pr. (4th Am. ed.) 1648, 1649, and cases in notes; *Bell v. Locke*, 8 Paige, 75; *Snowden v. Noah*, Hopk. 347; *Clark v. Clark*, 25 Barb. (N. Y.) 76; *Collins Co. v. Brown*, 3 K. & J. 423; *Coates v. Holbrook*, 2 Sandf. Ch. 586; *Kerr Inj.* 484 *et seq.*; *Lee v. Haley*, L. R. 5 Ch. Ap. 155; *Wheeler & Wilson Manuf. Co. v. Shakespeare*, 39 L. J. Ch. 36; *Boardman v. Meriden Britannia Co.* 36 Conn. 207. To warrant an injunction the resemblance between the trade-marks must be such as would deceive the ordinary mass of purchasers. *Merrimack Manuf. Co. v. Garner*, 4 E. D. Smith (N. Y.), 343; *Brooklyn White Lead Co. v. Masury*, 25 Barb. (N. Y.) 416; *Partridge v. Menck*, 2 Sandf. Ch. 622. The Court has not to inquire whether manufacturers could distinguish between the articles. *Shrimpton v. Laight*, 18 Beav. 164. It is not necessary to show that any person was deceived, if the resemblance of the articles is such as would be likely to cause one mark to be mistaken for the other. *Edelsten v. Edelsten*, 1 De G., J. & S. 185.

<sup>2</sup> See 2 Story Eq. Jur. § 951 *b*; *Emerson v. Badger*, 101 Mass. 82.

sauce, essence, or composition manufactured by or for him, and described as or purporting to be or represented as being Burgess's essence of anchovies, and from using with or for his bottles of the said sauce, essence, or composition, or any of them, any wrapper or wrappers, having printed thereon the words "Burgess's Essence of Anchovies," or any words applicable to or descriptive of the essence of anchovies made and sold by the plaintiff, and also from using, publishing, or circulating, or causing or procuring to be used, published, or circulated, any catalogue or catalogues, list or lists, purporting that the defendant was the manufacturer of "Burgess's Essence of Anchovies," or containing any word or words representing or leading purchasers or customers to believe that the sauce, essence, or composition manufactured and sold by \* the defendant was the same as that then and there- \* 897 tofore manufactured and sold by the plaintiff, and also from using or exhibiting any window bill, or other bill purporting that the defendant sold "Burgess's Essence of Anchovies;" and also from using any bill-head or invoice having thereon the words "Manufacturer of Burgess's Essence of Anchovies," or any words to such or the like purport or effect; and also from using any box or packing case, bearing thereon the words "Burgess's Essence of Anchovies," or any words to such or the like purport or effect; and also from publishing or causing to be published any advertisement or advertisements containing the words "Burgess's Essence of Anchovies," or any words to such or the like purport or effect.

The original motion before the Vice-Chancellor, besides seeking as above, sought to restrain the defendant from continuing over his shop-front the words "late of 107, Strand;" and from continuing on the sides of his shop a plate with the words "Burgess's Fish Sauce Warehouse, late of 107, Strand."

The bill, and the affidavits in support of the motion, stated in substance as follows:—

For many years previously to the year 1800, John Burgess, the late father of the plaintiff, carried on the trade of an Italian warehouseman, at No. 107, Strand, which embraced among other matters the making and vending of various fish sauces and other sauces. In the year 1800 the plaintiff, his only son, then twenty-two years of age, was taken into partnership by his father in the business, according to the terms of a deed of copartnership, dated the 10th of October, 1800, by which it was agreed that they



\* 898 should be partners in the said \* business during their joint lives in equal shares, and that upon the death of either of them, the surviving partner should be at liberty to carry on the business on his own separate account, and to continue to reside in the house and premises, paying to the legal representatives of the deceased partner the fair value of the share and interest of such partner in the stock in trade, utensils, and debts. The plaintiff and his father thenceforth carried on the trade in partnership together at No. 107, Strand, aforesaid, under the style or firm of "John Burgess & Son," down to the death of the plaintiff's father, who died in the year 1820, and left the plaintiff his sole executor and residuary legatee.

Since the death of the father the plaintiff had continued to carry on and then carried on the trade or business at No. 107, Strand, on his own sole account and for his own sole use, but under the same style of "John Burgess & Son," which had been previously used. No son of the plaintiff had at any time been admitted a partner in the trade or business, and the plaintiff was the sole proprietor of the said trade or business carried on at No. 107, Strand.

John Burgess, the plaintiff's father, was the first inventor and manufacturer of an essence or sauce called "Essence of Anchovies," which was manufactured and sold by him at No. 107, Strand, previously to the year 1800, and by the plaintiff and his father as such copartners as aforesaid subsequently to that year during the continuance of the copartnership, and had been since the death of the plaintiff's father, and still was, manufactured and sold by the plaintiff in very large quantities. The name "Essence of Anchovies" was first used and adopted by John Burgess the plaintiff's father, and was not used by any person before him.

\* 899 \* Since the year 1800 there had always been and there still were labels or printed papers affixed to or pasted on or round the bottles in which the said essence of anchovies so manufactured and sold by the plaintiff's father, and by him and the plaintiff jointly, and by the plaintiff as aforesaid, had been and was sold.

The plaintiff had two sons, William Harding Burgess and John James Burgess, who had been for many years retained and employed by the plaintiff in his said trade or business as his assistants, receiving salaries; and the defendant William Harding

Burgess was so retained and employed for a period of thirty years, or thereabouts, before and up to the month of May, 1851. He was permitted to reside on the trade premises, No. 107, Strand, and did so reside until February, 1847, and the plaintiff's other son also resided on the premises for many years.

Shortly before Midsummer, 1852, the plaintiff was informed that William Harding Burgess had taken a house, warehouse, and premises in King William Street, in the city of London, on a lease, or for a term to commence at or from Midsummer, 1852, and the plaintiff was afterwards informed that William Harding Burgess was fitting up the same premises for business.

About the 15th of August, 1852, the plaintiff was informed that William Harding Burgess had just opened business (as in fact he had) at or on the same premises in the trade of an Italian and fish sauce warehouseman, and was selling or offering for sale various sauces and other articles, such as were usually sold by Italian warehousemen.

The defendant had letters and figures over his shop-front \* the words "W. H. Burgess, late of 107, Strand;" the \* 900 words "W. H. Burgess" occupying the space over one window, and the figures and word "107, Strand," occupying the space over the other window, and the words "late of" being in the intermediate space over the fan-light, and being, according to the statements in the bill and the affidavit, in much smaller letters, and in German text, so as not to attract the same notice.

The labels used by the plaintiff and defendant respectively, which were principally relied upon, were as follows: —

"107 (royal arms), Strand, corner of the Savoy Steps. John Burgess & Son. Original and superior essence of anchovies. The excellence of their much-esteemed essence of anchovies stands unrivalled as a fish sauce, viz., for salmon, turbot, soles, eels, cod, haddock, and in all stewed fish. N. B. Be careful that you are not imposed upon by being supplied with the counterfeit sort, as many persons are daily waiting upon country shopkeepers, offering them an extra large profit to vend it. Burgess's new sauce is strongly recommended to those palates not partial to anchovy. The very flattering reception this new sauce has experienced induces the proprietors to offer it as one of general utility and convenience, being alike adapted for fish, game, meats, or poultry, all made

dishes, steaks, meat-pies, browning for gravies or soups, maintenance cutlets, &c."

" 86, King William Street,  
City, London. (Royal arms.)

Late of 107,  
Strand.

Burgess's

Essence of Anchovies.

" The excellence of the much-esteemed essence of anchovies  
\* 901 \* stands unrivalled as a fish sauce, viz., for salmon, turbot, soles, cels, cod, and for all stewed fish. This sauce is made with the same care which has rendered it pre-eminent, and is warranted to keep in extreme climates whether hot or cold. Burgess's universal sauce is confidently recommended to those not partial to the essence of anchovies. The proprietor is induced to offer this sauce as one calculated for general utility and convenience, being applicable to all kinds of fish, game, made dishes, steaks, chops, meat-pies, mutton-cutlets, &c."

The Vice-Chancellor granted an injunction, restraining the defendant from continuing the use of the words " late of 107, Strand," and from continuing on the sides of his shop door the plate with the words " Burgess's Fish Sauce Warehouse, late of 107, Strand," but refused the rest of the motion.

From this refusal the plaintiff now appealed.

*Sir Frederick Thesiger, Mr. Campbell, and Mr. Regnier Mobre,* for the motion.—The words " Burgess's Essence of Anchovies" have never been used except to designate the article manufactured and sold by the plaintiff and his late father, or one of them, and would always be supposed to denote that the article to which they were affixed had been so manufactured and sold. The circumstance that another person has the same name does not entitle him to mislead the public by adopting the trade-mark in which the plaintiff has acquired a property. In *Sykes v. Sykes*, (a) the plaintiff made shot-belts and powder-flasks, which he was accustomed to mark with the words " Sykes's Patent." \* The defendants in that case, one of whom was named Sykes, used a stamp with the words " Sykes's Patent," and it was con-

(a) 3 B. & C. 541.

tended that as one of the defendants was named Sykes, and the plaintiff had no more right to call his goods patent than the defendants, the proceeding was justifiable; but the Court of Queen's Bench held, that although the defendants did not themselves sell the articles as goods of the plaintiff's manufacture, the verdict for the plaintiff ought not to be disturbed. In *Blofeld v. Payne*, (a) the plaintiff was the inventor of metallic hones which he was accustomed to wrap up in envelopes to distinguish them. The defendants made other hones and wrapped them up in similar envelopes, whereby the plaintiff alleged that he was prevented from disposing of a great number of his hones, and they were depreciated in value, and injured in reputation: it was held that the plaintiff was entitled to damages, although he did not prove that the defendants' hones were inferior, or that he had sustained any specific damage.

[THE LORD JUSTICE KNIGHT BRUCE. — The law on the subject is as old as *Southern v. How*, in Popham's Reports. (b)]

In *Croft v. Day*, (c) Lord LANGDALE said: "No man has a right to sell his own goods as the goods of another. You may express the same principle in a different form, and say that no man has a right to dress himself in colours, or adopt and bear symbols, to which he has no peculiar or exclusive right, and thereby personate another person, for the purpose of inducing the public to suppose, either that he is that other person, or that he is connected with and selling the manufacture of such other person, \*while he is really selling his own. It is perfectly mani- \* 903 fest that to do these things is to commit a fraud, and a very gross fraud. I stated upon a former occasion, that, in my opinion, the right which any person may have to the protection of this Court does not depend upon any exclusive right which he may be supposed to have to a particular name, or to a particular form of words. His right is to be protected against fraud, and fraud may be practised against him by means of a name, though the person practising it may have a perfect right to use that name, provided he does not accompany the use of it with such other circumstances as to effect a fraud upon others."

(a) 4 B. & Ad. 410.

(b) Page 144.

(c) 7 Beav. 84-88.

*Perry v. Truefitt* (a) is to the same effect. In *Millington v. Fox* (b) the Court held that there is a title to trade-marks independently of fraud. Lord COTTENHAM, in giving judgment in that case, said, "It does not appear to me that there was any fraudulent intention in the use of the marks. That circumstance, however, does not deprive the plaintiffs of their right to the exclusive use of those names;" and his Lordship decreed a perpetual injunction.

They also referred to *Lewis v. Langdon* (c) and *Knott v. Morgan*. (d)

*Mr. Bacon* and *Mr. May*, for the defendant, were not called upon.

THE LORD JUSTICE KNIGHT BRUCE. — All the Queen's subjects have a right, if they will, to manufacture and sell pickles and sauces, and not the less that their fathers have done so \* 904 before them. All \*the Queen's subjects have a right to sell these articles in their own names, and not the less so that they bear the same name as their fathers; nor is there any thing else that this defendant has done in question before us. He follows the same trade as that his father follows and has long followed, namely, that of a manufacturer and seller of pickles, preserves, and sauces; among them, one called "essence of anchovies." He carries on business under his own name, and sells his essence of anchovies as "Burgess's Essence of Anchovies," which in truth it is. If any circumstance of fraud, now material, had accompanied, and were continuing to accompany, the case, it would stand very differently; but the whole case lies in what I have stated. The whole ground of complaint is the great celebrity which, during many years, has been possessed by the elder Mr. Burgess's essence of anchovies. That does not give him such exclusive right, such a monopoly, such a privilege, as to prevent any man from making essence of anchovies, and selling it under his own name. Without therefore questioning any one of the authorities cited, all of which I assume to have been correctly decided, I think that there is here no case for an injunction.

(a) 6 Beav. 66.

(c) 7 Sim. 421.

(b) 3 M. & C. 338.

(d) 2 Keen, 213.

But if I had any doubt upon the matter, it would be impossible, I think, to accede to the present motion, a mere interlocutory application by way of appeal, notice of which is not given till March, to vary an order pronounced in the preceding October. I am of opinion that this motion must be refused with costs, with liberty to the plaintiff to take such proceedings at law as he may be advised.

THE LORD JUSTICE TURNER. — I concur in the opinion that this motion should be refused with costs. No man can have any right to represent \* his goods as the goods of another per- \* 905 son, but in applications of this kind it must be made out that the defendant is selling his own goods as the goods of another. Where a person is selling goods under a particular name, and another person, not having that name, is using it, it may be presumed that he so uses it to represent the goods sold by himself as the goods of the person whose name he uses ; but where the defendant sells goods under his own name, and it happens that the plaintiff has the same name, it does not follow that the defendant is selling his goods as the goods of the plaintiff. It is a question of evidence in each case whether there is false representation or not. Looking at the labels before us, I think it is clear that, since the order made by the Vice-Chancellor, there has been no representation made on the part of the defendant that the goods which he is selling are the goods manufactured by the plaintiff. This motion, therefore, must be refused with costs, the plaintiff having liberty to proceed at law as he may be advised.

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\* LODGE *v.* PRICHARD.

\* 906

1853. March 19. Before the LORDS JUSTICES.

The meaning of the Act 15 & 16 Vict. c. 86, § 54, is, that where vouchers have been lost, or the accounts cannot be taken in the ordinary way, the Court may give special directions. But such directions will not be given unless it appears that the ordinary evidence cannot be had, or merely to save expense.<sup>1</sup>

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<sup>1</sup> See 2 Dan. Ch. Pr. (4th Am. ed.) 1231, 1232, and notes; *Ewart v. Williams*, 7 De G., M. & G. 68; 1 Jur. N. S. 409; 3 Drew. 21; *Morgan v Higgins*, 1 Giff. 270, 283; *Sleight v. Lawson*, 3 K. & J. 292.

*Seemle*, that by the ordinary rules of the Court partnership books are admissible in evidence for and against all the partners and their estates.<sup>1</sup>

*Seemle*, that the 15 & 16 Vict. c. 86, § 54, does not operate retrospectively.

THIS was an appeal of defendants from the refusal by Vice-Chancellor STUART of motion that in taking the accounts directed by the decree on July 23, 1851, of the dealings and transactions between Adam Lodge, the testator in the pleadings named, and the defendants, Richard Williams Prichard and William Rushton Coulborn, and in making the inquiries as to what the partnership consisted of at the time of the death of the testator, and what was the share and interest of the testator therein, the several partnership books of account, in which the accounts of the said dealings and transactions had been kept (*viz.*, the "cash-book," "waste-book," and "ledger," used in keeping the partnership accounts between the testator and the defendants Richard Williams Prichard and William Rushton Coulborn) might be taken as *prima facie* evidence of the truth of the matters therein contained.

In support of the motion the defendant William Rushton Coulborn deposed that for several years prior to the 1st of January, 1837, the testator had carried on business in Liverpool as a ship-owner and general merchant in partnership with the defendant R. W. Prichard and the deponent; but that during such period the testator was interested in the ships only as a part owner thereof, and had no interest in the general business; that in the month of January, 1837, it was arranged that the deponent should also be admitted as a partner in the general business from the 1st of January, 1837; that the last-mentioned partnership was \* 907 determined by the \* death of the testator on the 5th of April, 1847; that within a month after the death of the testator and at an interview which the deponent had with the plaintiff and John Lodge Ellerton, one of the defendants, respecting the testator's affairs, the deponent suggested to them that it would be satisfactory to Richard Williams Prichard and himself

<sup>2</sup> Dan. Ch. Pr. (4th Am. ed.) 1250; *Topliff v. Jackson*, 12 Gray, 565; *v. Corning*, 3 Paige, 566. Generally, it is sufficient to examine and books of the copartners, without requiring vouchers in support of each item. *Fletcher v. Pollard*, 2 Hen. & M. 544; *Brickhouse v. Hunter*, 363; *Turner v. Hughes*, 1 Busbee Eq. (N. C.) 116; *Reed v.*

if the plaintiff and Mr. Ellerton would employ an accountant to examine the books of the partnership and investigate the testator's affairs on their behalf, and that accordingly they appointed, for that purpose, an accountant named Banner, who instituted a laborious investigation of the copartnership affairs on behalf of the plaintiff and Mr. Ellerton, and that some closing entries were made in such books by his direction, or with his full sanction and approval, for the purpose of ascertaining the profits, if any, and making a division thereof, and otherwise adjusting such partnership accounts, and that the same were so adjusted and settled by him up to the 5th of April, 1837; that no entry was made in the partnership books subsequently to the death of the testator, except by the direction or with the full sanction and approval of Mr. Banner, and that no such entry was made except for the purpose of properly stating, adjusting, and settling the partnership accounts; that the cash-book, waste-book, and ledger used by the partnership in keeping the partnership accounts were severally produced to and identified by him (the deponent) at the time when he made an affidavit in the cause filed 11th January, 1853; that the entries appearing in the said partnership books, except the entries made as aforesaid by and with the direction or sanction of Mr. Banner, were severally made from time to time in a due course of business.

*Mr. W. M. James* and *Mr. Selwyn* supported the motion, which was opposed by the plaintiff in person. — \*The Act \* 908 15 & 16 Vict. c. 86, § 54, (a) was referred to and relied upon.

THE LORD JUSTICE TURNER. — According to the view which we

(a) 15 & 16 Vict. c. 86, § 54, "It shall be lawful for the Court in any case where any account is required to be taken to give such special directions, if any, as it may think fit, with respect to the mode in which the account should be taken or vouched, and such special directions may be given either by the decree or order directing such account, or by any subsequent order or orders upon its appearing to the Court that the circumstances of the case are such as to require such special directions, and particularly it shall be lawful for the Court, in cases where it shall think fit so to do, to direct that in taking the accounts the books of account in which the accounts required to be taken have been kept, or any of them, shall be taken as *prima facie* evidence of the truth of the matters therein contained, with liberty to the parties interested to take such objections thereto as they may be advised."



take of this case, it is not necessary for us to make any order. I take the meaning of the Act of Parliament to be that, where vouchers have been lost or accounts cannot be taken in the ordinary course, the Court may give directions as to the mode in which the accounts shall be taken, and as to the evidence which may be adduced in support of the items; and in truth, according to my recollection, the clause referred to, only established a practice which had been already adopted. [His Lordship referred to *Brown v. De Tastet. (a)*] The Court always used to exercise this power, but if, upon a cause coming on for further directions, it appeared that justice had not been done in the Master's office, the case was sent back to the Master with special directions. Here there is no *constat* that the ordinary evidence cannot be had. It may be expensive, but I am not prepared to say that this Court can exercise the power of dispensing with the ordinary

\* 909 \*evidence for the mere purpose of saving expense. [His Lordship read the section of the Act.] I think that the Court is bound to see whether the matter requires special directions to be given before it gives any such directions. This does not appear to me to be a case coming within the meaning of the Act. I am aware that some doubt has been felt in the Master's offices whether entries in partnership books are evidence against all the parties, but I am not aware that any such doubt has been expressed by the Court. If the point should be brought before the Court, it would be by way of exception, and it would then be decided, and if necessary, proper directions would be given: I also doubt whether the Act can operate retrospectively.

THE LORD JUSTICE KNIGHT BRUCE. — There are two points, on each of which I entertain too much doubt to dissent from the order before us. 1st, Whether the 54th section of the Act of Parliament applies to an account directed to be taken by a decree made before the Act passed; 2d, Whether the only order which could have been made would not have been one to the effect that the books should be taken as *primâ facie* evidence.

Why are they not so now? They contain accounts of the dealings and transactions of a partnership, and an account of these dealings is sought at the instance of a person beneficially interested

(a) Jac. 284.

in the estate of one of the partners against his surviving partners. That question only relates to what took place in the lifetime of the deceased partner. *Prima facie*, the books of the partnership are evidence among all the partners, for them all and against them all, owing to the agency which pervaded all the partnership transactions. If one partner succeeded in establishing a case of fraud, that would form \* a ground for an exception \* 910 from the general rule, nor is there any thing in the rule to exclude an allegation of a mistaken or erroneous omission or insertion.<sup>1</sup> The only question is, whether the books are *prima facie* evidence between the partners and their estates. In my opinion, they are; and therefore the only order which could reasonably be made, would not give the appellants more than the law already gives them.

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### JONES v. ROBINSON.

1853. March 8. Before the LORDS JUSTICES.

The plaintiff in a partition suit was entitled to six-sevenths of the estate, and had the title-deeds: *Held*, that the proper form of decree as to the documents of title was for the delivery to the defendant of such of them as related exclusively to the land which should be allotted to him, and for the retainer by the plaintiff of the rest, he undertaking to abide by any order which the Court might make as to the same, with liberty for either party to apply.<sup>2</sup>

THIS was an appeal from the decision of the Master of the Rolls upon a claim for partition, and the question was as to the form of the decree with respect to the custody of the documents of title. The plaintiff and one of the defendants were tenants in common of the property, the plaintiff being entitled to six-seventh parts, and the defendant to the remaining one-seventh.

The deeds and writings were in the possession of the plaintiff.

*Mr. Giffard*, for the plaintiff, contended that the plaintiff was

<sup>1</sup> 2 Dan. Ch. Pr. (4th Am. ed.) 1250; *Smith v. Chandos*, 2 Atk. 158; *Heartt v. Corning*, 3 Paige, 566; *Stoughton v. Lynch*, 2 John. Ch. 218; *Hutcherson v. Smith*, 5 Irish Eq. 117; *Morehouse v. Newton*, 3 De G. & Sm. 307.

<sup>2</sup> See *Elton v. Elton*, 27 Beav. 632; 6 Jur. N. S. 106; 2 Dan. Ch. Pr. (4th Am. ed.) 1162.

entitled to retain all the deeds except such as related exclusively to the distinct parts of the property, which should be allotted to the defendant. He referred to Hand's Practice, p. 152,

\* 911 and the form (a) of \* order upon a purchase under a decree there set out as settled by Lord HARDWICKE.

*Mr. Karlake*, for the defendant entitled to the other one-seventh. — An order on a purchase under the decree of the Court differs entirely from a decree in a partition suit. The proper form of decree in the latter case is to direct the deposit of the deeds relating to all the property in the Master's office. (Seton on Decrees, 187), *Trodd v. Downes*. (b) One tenant in common has no more right to the deeds than the other.

[THE LORD JUSTICE KNIGHT BRUCE. — But what right has the other to take them from him if he has the possession?]

*Mr. Bazalgette* appeared for another defendant.

THE LORD JUSTICE KNIGHT BRUCE. — I am not aware of any rule of practice or convenience which requires, in the absence of any special circumstance, the deposit in the Master's office or the record office of deeds relating to property allotted to more persons than one. There appears to be no general rule to that effect.

The general rule seems to be to frame the decree as in \* 912 *Lord Cardigan's Case*, (c) and to \* reserve liberty to apply

(a) August 8th, 1794. — "And it is ordered, that such of the title-deeds, evidences, and writings as relate solely to the estate purchased by the said J. H., and also such as relate to the same jointly with other estates of less value, be delivered to the said J. H., or to whom he shall appoint, he submitting to produce such last-mentioned deeds and writings on necessary occasions, and to enter into a covenant for that purpose, and to give attested copies thereof when required at the expense of the party requiring the same, but as to such of the title-deeds as relate to the estate purchased by the said J. H., jointly with other estates of greater value, he is to have attested copies thereof at the expense of the estate, and the persons entitled to such estates of greater value, are to execute to him the like covenants to produce such deeds and writings on necessary occasions, and in case any dispute shall arise between the parties touching the copies of any particular deeds relating to the title the said Master is to settle the same."

(b) Seton on Decrees, 188; 2 Atk. 304.

(c) Seton on Decrees, 185.

[ 708 ]

as to such documents; and the proper course, as it appears to me, is to leave the deeds where they are, with liberty to apply; the plaintiff undertaking to abide by any order which the Court may make.

**THE LORD JUSTICE TURNER.** — The right to partition is a legal right, and I see no sufficient reason for giving the direction now sought.

The following was the form of the order: —

It is ordered that the defendant, Roger Farrand Jackson, do convey the legal estate vested in him, of and in the one-seventh of the legal estate in the hereditaments and premises in the plaintiff's claim and affidavit mentioned, to the plaintiff, his heirs and assigns, such conveyance to be settled by the Master of this Court in rotation, in case the parties differ about the same. And it is ordered that a commission of partition do issue, directed to certain commissioners to be therein named, to divide the said hereditaments and premises in question into seven equal parts, and to make such partition in metes and bounds when they shall see occasion. And it is ordered that six-sevenths thereof be allotted as the share of the plaintiff, and one-seventh as the share of the defendant, Robert Robinson, who are to hold and enjoy the respective shares and proportions of the said estates in severalty according to such allotment, and execute mutual conveyances of such respective shares or proportions according to their respective interests therein, and as they may respectively direct, such conveyance to be settled by the Master of this Court in rotation, in case the parties differ about the same. And it is ordered that the said Robert Robinson be appointed to convey the said hereditaments in the place and stead of Robert \*H. Wilson, in the claim mentioned. \*913 And it is ordered that he do convey the same in his place and stead, and execute in his place and stead such deed or deeds as is or are necessary for that purpose. And it is ordered that all deeds and writings in the custody or power of any of the parties be produced before the commissioners on oath as they shall require, and the said commissioners are to be at liberty to examine witnesses upon oath, and take the depositions in writing, and return the same with the commissioners' report, and after making such partition and division, it is ordered that such of the title-deeds

and writings as shall appear to relate solely to any distinct part of the said hereditaments and premises which shall be allotted to either party be delivered to such party. And it is ordered that the plaintiff be at liberty to retain the rest of such title-deeds and writings, he undertaking to abide by any order which this Court may make as to the same, and either party is to be at liberty to apply to this Court for directions concerning the same. And it is ordered that the charges of such partition be borne ratably and in proportion to the estates so to be allotted to them, and any of the parties are to be at liberty to apply to this Court as advised.

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\* 914 \* JOHNSON *v.* THE SHREWSBURY AND BIRMINGHAM RAILWAY COMPANY.

1853. March 23, 24. Before the LORDS JUSTICES.

A railway company agreed with contractors that the contractors should work the line and keep the engines and rolling plant in repair at a specified remuneration, and that the contract should be in force for seven years, but with a proviso for its determination if the contractors did not, within forty-eight hours after notice given by the company, obey the instructions contained in such notice: *Held*, that the agreement was not of such a kind as to be enforceable by injunction restraining the company from determining the contract and resuming the possession of their line for non-obedience to impracticable instructions.<sup>1</sup>

*Quære*, whether such an agreement is consistent with public policy.

Observations on the application of the principle of specific performance to contracts respecting personal services.

THIS was an appeal from the refusal by Vice-Chancellor Wood of a motion for an injunction.

By an agreement dated the 1st of July, 1852, and made between the plaintiffs, Messrs. Richard William Johnson and Thomas William Kinder, hereinafter called the contractors, of the one part, and the defendants, the Shrewsbury and Birmingham Railway Company, of the other part, after reciting that the parties thereto had entered into two agreements in writing bearing date

<sup>1</sup> See 1 Redfield Railw. (3d ed.) 589, and cases cited in notes.

respectively the 31st of May, 1849, whereby for the considerations therein stated the contractors agreed for the period of ten years (but determinable as therein mentioned), to keep in repair and maintain all the rolling stock and to work all the trains of the railway company; and that it was found by the parties thereto to be convenient and mutually advantageous to alter and vary the terms and conditions upon which, during the unexpired term of the said agreements and the term thereafter mentioned, the contractors should keep in repair and maintain the said rolling stock, and work the trains of the said railway company, and do the several matters connected therewith thereafter mentioned;

\* and it had been accordingly agreed by them to alter and \* 915 vary the terms of the said agreements, and to determine and cancel the same, except as thereafter provided. It was witnessed that the said parties mutually entered into the stipulations thereafter contained, of which the following were those material to be stated :—

“First. The contract to endure for a term of seven years, commencing from the said 1st day of July, 1852, and terminating upon the 30th day of June, 1859, subject, however, to its earlier determination as follows: that is to say, if the said parties hereto of the first part, or either of them, shall become bankrupt or take the benefit of any Act of Parliament now or to be in force for the relief of insolvent debtors, this agreement shall forthwith cease and be void, without prejudice nevertheless to the rights of any of the said parties hereto which may have accrued or have arisen under this agreement prior to the date of such bankruptcy or insolvency as aforesaid, or to the rights of the railway company consequent upon such bankruptcy or insolvency, which it is hereby declared shall be held to be a default on the part of the contractors in the performance of this agreement for the remainder then to come and unexpired of the said term of seven years. And further, if the parties hereto of the first part, or either of them, shall not within forty-eight hours after notice in writing from the railway company, signed by the secretary, shall have been left at their principal office upon the said railway, at or near the Stafford Road, Wolverhampton, obey the instructions which may be given in such notice, within the meaning and intent of the stipulations herein contained, it shall be lawful for the railway company forthwith, by

another notice in writing signed by the secretary, and delivered to the contractors or left at their principal office aforesaid, \* 916 to determine this contract, \* and immediately to assume the custody of all sheds and buildings, plant, engines, and rolling stock of every description, which may have been intrusted to the said parties in consequence of this contract; and further, in case the said railway company shall at their own desire wish to terminate this contract, and shall deliver to the said contractors or either of them, or to the survivor of them, or to the executors or administrators of such survivor, or to the persons or person who for the time being shall carry on the business aforesaid, at their principal office aforesaid, or other principal office which the said parties may then use, a notice signed by the secretary, stating their desire to terminate the same on a day to be stated in such notice, not being earlier than three calendar months from the date of the delivery of such notice, then and in such case this contract shall cease and determine, and the parties hereto of the first part, in that event, shall be entitled to the compensation hereinafter provided to be made and paid by the said company."

"Fourth. That the said contractors shall and will, from time to time, during the term of this contract, repair, restore, or entirely replace, as may be necessary, all rolling stock of the said railway company damaged, broken, or destroyed by accident, whether by collisions, fire, storm, or any other cause which shall happen to the same, on any part of the lines of or worked by the railway company: Provided always, that the contractors shall not be required to make good any rolling stock damaged or destroyed by collisions or otherwise, whenever the same shall become the subject of investigation by the Board of Trade, or other department of government for the supervision of railways, and the government inspector shall report that such damage has been \* 917 occasioned otherwise than by the fault of the said \* contractors or their servants, or when any person who may be agreed upon by the railway company and the contractors to inquire into the circumstances shall so report: Provided also, that the contractors shall not be liable or answerable for any loss, damage, and compensation, or other payment, recovered or recoverable from the railway company in respect of the death of or any damage or injury to any passengers, or live stock,

or goods conveyed in such trains as hereinafter mentioned, except when caused by the neglect of the contractors, or their servants; but in such case the liability of the contractors shall not on any one occasion of accident exceed the sum of 100*l.* for or in respect of all the deaths, losses, damages, and injuries caused by or resulting from such accident: Provided further, that no amount in respect of damage shall be payable by the contractors when the same has been occasioned by defect of the permanent way, or by want of due repair and maintenance of the same; and provided further, that nothing herein contained shall prevent either party to this agreement having all usual remedies at law against any person or persons, company or companies, causing such damage."

"Fifth. The said contractors will, from time to time, and at all times during the term of this contract, run and work all the trains of the railway company, and provide for the purposes of this contract a sufficient number of efficient foremen, mechanics, engine-drivers, firemen, cleaners, storekeepers, and other persons, and the requisite coke and firewood, oil, tallow, grease, waste hemp, turpentine, red-lead and other materials, of the best quality: Provided always, that in the event of the parties hereto of the first part failing, after twenty-four hours' notice, to use their best exertions to employ the necessary workmen, and provide the necessary stores or implements, the railway company shall have the power, \* on the certificate of their engineer or other person \* 918 appointed by the said railway company that such are required, to employ such persons or provide such stores as he shall recommend, and charge the expenses or costs of the same against the said contractors."

The thirteenth and some following clauses defined the sums which the railway company were to pay to the contractors for the cleaning, working, repairing, and maintaining of the stock.

The plaintiffs by their bill stated the above agreement, and that the plaintiffs had since the date of it been working the railway according to the stipulations thereof; that, on the 5th of February, 1853, a notice in writing signed by the secretary of the railway company was served on the plaintiffs, requiring them forthwith to put into perfect and efficient working order and condition, to the satisfaction of the company, all the locomotive engines and tenders, carriages, and wagons of every description; and that, on the 2d



of March, 1853, the company's solicitors served the plaintiffs with a notice as follows:—

“To Messrs. Richard William Johnson and Thomas William Kinder.—The Shrewsbury and Birmingham Railway Company do hereby, in pursuance of the provisions contained in the articles of agreement bearing date the 1st of July last, give you and each of you notice to obey all and every of the instructions following; that is to say, that you do well and truly clean, work, and keep in good and substantial repair and in perfect and efficient proper working order and condition, to the satisfaction of the said railway company, all the locomotive engines and tenders, carriages, and wagons of every description belonging to the company; \* 919 that \* you regularly start, run, and work all the goods trains of the said company, as arranged and mentioned in the time bill, and strictly and punctually attend to the times of departure and arrival mentioned in such bill; that you convey, by the first goods train which shall start after the time they are delivered to you for conveyance, all goods, minerals, and merchandise then ready to be forwarded, not exceeding such quantity as an engine in good and substantial repair and in proper and efficient working order and condition can draw; and, in case a greater quantity shall then be ready to be conveyed, then that you convey as much thereof as an engine can draw; that you do not use any of the extra stock belonging to the company, whether locomotive engines, tenders, carriages, or wagons of any description, without the permission in writing of Mr. Edmund Petre on behalf of the said company first had and obtained.”

The bill further stated that the plaintiffs had always conveyed the goods, minerals, and merchandise by the goods trains which started first after the time the same were delivered to them whenever it was possible to do so, but that, owing to the goods traffic being much greater in quantity than the trains in the time table were sufficient to carry, it was not possible at all times to convey all the goods, minerals, and merchandise by the goods trains which started first after the time the same were delivered, and such an arrangement could only be carried out by means of special trains, and that the defendants, if they considered such an arrangement necessary, ought to have provided special trains for the pur-

pose, which, however, they did not do. That, by the thirteenth and fourteenth clauses of the contract, the plaintiffs were to be consulted by the company as to the advantageous working of the locomotive engines in the timing of the trains ; but that the plaintiffs had never been consulted at all in the matter, and that they had always \* protested, but without effect, against the \* 920 timing of goods trains as fixed by the last time table of the 18th of January, 1858, inasmuch as the times of starting the goods trains were therein not arranged for the advantageous working of the locomotive engines, and the plaintiffs had been unable to obey, and had not obeyed, the instructions in the said notice contained with regard to the use of extra stock, but they had continued to use the three engines part of the extra stock, inasmuch as if they had not done so the passenger trains could not have run, to the great detriment of the company and the inconvenience of the public as aforesaid. That the plaintiffs were advised and insisted that, according to the true construction of the said contract, the instructions contained in the notices of the 4th of February, 1858, and 2d of March, 1858, with respect to the plaintiffs putting into perfect and efficient working order and condition, to the satisfaction of the company, all the locomotive engines and tenders, carriages, and wagons of every description, were not instructions within the meaning and intent of the stipulations contained in the said contract, inasmuch as the instructions mentioned in the said contract had reference only to instructions to the plaintiffs to do and perform such matters and things within the scope of the said contract as the plaintiffs might reasonably be expected to do and perform within the space of forty-eight hours from the time of the serving the notice containing such instructions, and as the plaintiffs, by not immediately obeying, would render themselves liable to the imputation of acting in a wilful and refractory manner ; and that it was clearly impossible for the plaintiffs to carry into effect the instructions contained in the notices of the 4th of February, 1858, and the 2d of March, 1858, so far as related to the putting into perfect and efficient working order and condition the rolling stock within forty-eight hours from the time of the serving such notice.

\* The prayer was : 1st, That it might be declared that, \* 921 according to the true construction of the contract, the instructions mentioned in the first clause of the contract referred

[ 715 ]

only to instructions to the plaintiffs to do and perform such matters and things as might reasonably be done and performed within forty-eight hours from the service of the notice in the first clause of the contract firstly mentioned ; and that, if any of the instructions given in such notice as was in the first clause of the contract firstly mentioned should be such as could not reasonably be carried into effect within forty-eight hours from the time of the serving such notice, it was not lawful for the defendants, by such notice as was in the first clause of the contract secondly mentioned or otherwise to determine the contract, or to assume the custody of all or any sheds or buildings, plant, engines, or rolling stock of any description, which might have been intrusted to the plaintiffs in consequence of the contract, by reason that the plaintiffs had not obeyed such instructions as aforesaid ; or at any rate that it might be declared that, according to the true construction of the contract, it was not lawful for the defendants, by such notices as were in the first clause of the contract firstly and secondly mentioned, or either of such notices, to determine the contract, or to assume the custody of all or any sheds or buildings, plant, engines, or rolling stock of any description, which might have been intrusted to the plaintiffs in consequence of the contract, in case the plaintiffs should, within forty-eight hours from the serving of the first of such notices, with due diligence take all proceedings necessary and proper for carrying into effect the instructions which might be given in the first of such notices within the meaning and intent of the stipulations contained in the contract. 2d, That the defendants, their directors, agents, servants, and workmen might be restrained by injunction from determining the contract, by

\* 922 giving such notice as was in the \* first clause of the contract secondly mentioned, by way of second notice after the notices of the 4th of February, 1853, and the 2d of March, 1853, or either of them, and from assuming the custody of all or any sheds or buildings, plant, engines, or rolling stock of any description, which might have been intrusted to the plaintiffs in consequence of the contract; and further, that the railway company, their directors, agents, servants, and workmen, might be restrained by injunction from determining the contract by any such notices, whether already given or thereafter to be given, as were in the first clause of the contract firstly and secondly mentioned, or either of such notices, and from resuming the custody of all or any sheds

or buildings, plant, engines, or rolling stock of any description, which might have been intrusted to the plaintiffs in consequence of the contract, until the true construction of the contract should have been declared by the decree to be made at the hearing of the cause, or until the Court should make other order to the contrary; and that such injunction as was thereby prayed, or an injunction in such other terms as the Court should think fit, might be made perpetual at the hearing of the cause.

A motion was made, in the month of March, 1853, before Vice-Chancellor Wood, for the injunction in the terms of the prayer of the bill, and was refused.

From this refusal the plaintiffs appealed.

*The Attorney-General, Mr. Craig, and Mr. Lambert*, in support of the appeal. — The notice was a mere attempt to escape from the equitable performance of the agreement by a compliance with its literal terms. This the Court will not permit. Nor will any difficulty which there might be in enforcing specifically the performance of the agreement against \*the plaintiffs ex- \* 923 clude them, on the ground of want of mutuality, from the relief which this Court has it in its power to afford. *Lumley v. Wagner.* (a) The injury to the plaintiffs is not merely a pecuniary one, since their reputation as contractors would be prejudiced by their dismissal.

*Mr. Rolt and Mr. Giffard*, for the respondents, were not called upon.

THE LORD JUSTICE KNIGHT BRUCE. — For the purpose of determining the question raised by this motion, whether the injunction should be granted or refused, I am of opinion that all the facts may be assumed to be as the plaintiffs have alleged.

The bill is filed by two persons, parties to the agreement, against the other parties, with two objects, — one to obtain a declaration from this Court of the true construction of the terms of the agreement, and the other to obtain an injunction to restrain the defendants from breaking the agreement in certain respects. If, therefore, the bill is not a bill for specific performance in form and letter, it

(a) 1 De G., M. & G. 604.

is so in substance and spirit; and the same rules must be applied to the case as would be applied to a formal bill of specific performance.

Now, before the Court can act in the exercise of its peculiar jurisdiction to enforce specific performance of an agreement, it must be satisfied that there is not a reasonable ground for contending that the agreement is illegal or against the policy of the law; and in the next place, that the agreement is one ascribable to a class in which the Court has been accustomed, or has certainly jurisdiction, to interfere.

But, in the first place, I cannot persuade myself that  
\* 924 \* this agreement is not illegal or not against the policy of the law; though I do not intend to represent myself as entertaining a confident opinion upon the point. I doubt, but I pass from it and take the point to be in favour of the plaintiffs; that is to say, I assume that they are entitled to sustain an action upon the agreement. In the next place, however, it cannot be said that this kind of agreement belongs to a class in which the exercise of the jurisdiction for specific performance has been habitual or familiar. I cannot represent myself as recollecting an analogous case at this moment in which that jurisdiction has been exercised. The demand may, however, be new specifically, without being new in kind or principle. This contract is an agreement that during the term of seven years, of which five or six are yet unexpired, the defendants shall employ the plaintiffs in a capacity which may be described as something between agents and servants, perhaps more approaching to the ordinary notion of servants than to that of agents. The servant or agent has on one side certain specified duties to perform, and the master or principal has on his side certain duties to perform too; but they mainly consist in paying money for the services of the agent, — earning of money being the sole view to be ascribed to the agent or servant in entering into the contract. Now the nature of the service to be rendered in the present case may (without entering into particulars) be described in the words of the first half of the fifth section of the contract; viz., “that the said contractors will from time to time at all times during the term of this contract run and work all the trains of the railway company, and provide for the purposes of this contract a sufficient number of efficient foremen, mechanics, engine-drivers, firemen, cleaners, storekeepers, and other persons, and the

requisite coke and firewood, oil, tallow, grease, waste hemp, turpentine, red-lead, and other materials of the best quality."

\* I may observe also, before passing from this part of the \* 925 agreement, that, in the clause immediately before the one. that I have quoted, there is a provision which appears to me rather extraordinary. It may be the result of my inexperience in these matters, but it does to me seem singular. It is this: "Provided also, that the contractors shall not be liable or answerable for any loss, damage, compensation, or other payment recovered or recoverable from the railway company in respect of the death of, or of any damage or injury to, any passengers or live stock, or goods conveyed in such trains as hereinafter mentioned, except when caused by the neglect of the contractors or their servants, but in such case" — that is, on the neglect of the contractors or their servants — "the liability of the contractors shall not, on any one occasion of accident, exceed the sum of 100*l.* for or in respect of all the deaths, losses, damages, and injuries caused by or resulting from such accident." The effect, therefore, is that the running and working of the trains, so deeply interesting to a large class of the Queen's subjects, is committed to the superintendence of men who may cause any number of deaths, and any amount of bodily injury, to any number of persons, at the cost of 100*l.* and no more.

When the directors, to use a technical phrase, run and work the trains themselves, they are under a general responsibility, and there is therefore a kind of imperfect guarantee for their care and attention; but in the present instance society loses even that guarantee, — a consideration not without its bearing on the question whether the agreement is or is not contrary to public policy.

Assuming, however, that there is nothing in the agreement contrary to public policy, still I apprehend that there may be objections to the Court interfering by way of specific performance. I may have made these \* observations rather out of place, but \* 926 they do not seem to be immaterial. There is here an agreement, the effect of which is that the plaintiffs are to be the confidential servants of the defendants in most important particulars, in which, not only for the sake of the persons immediately concerned, but for the sake of society at large, it is necessary that there should be the most entire harmony and spirit of co-operation between the contracting parties. How is this possible to prevail

in the position in which (I assume for the purpose of the argument by the default of the defendants) the defendants have placed themselves? We are asked to compel one person to employ against his will another as his confidential servant, for duties with respect to the due performance of which the utmost confidence is required. Let him be one of the best and most competent persons that ever lived, still if the two do not agree, and good people do not always agree, enormous mischief may be done.

A man may have one of the best domestic servants, he may have a valet whose arrangement of clothes is faultless, a coachman whose driving is excellent, a cook whose performances are perfect, and yet he may not have confidence in him; and while on the one hand all that the servant requires or wishes (and that reasonably enough) is money, you are on the other hand to destroy the comfort of a man's existence for a period of years, by compelling him to have constantly about him in a confidential situation one to whom he objects. If that be so in private life, how important do these considerations become when connected with the performance of such duties—duties to society—as are incumbent upon the directors of a company like this! I think that by interfering in the present case there would be no equality. Of course I do not mean to use the word “equality” in the sense of “mutuality,” to which I may now address a few observations.

\* 927 \* It is clear in the present case that, had the defendants been minded to compel the plaintiffs to perform their duties against their will, it could not have been done. Mutuality therefore is out of the question, and, according to the rules generally supposed to exist in Courts of Equity, that might have been held sufficient to dispose of the matter; cases, however, have existed where, though the defendant could not have been compelled to do all he had undertaken to do by the contract, yet, as he had contracted to abstain from doing a certain thing, the Court has interfered reasonably enough.

A case, lately much referred to on this point, is that of a German singer, who, having found probably that more could be obtained by breaking her promise than by keeping it, determined to obtain the larger sum and accordingly to break her promise. She could not be compelled to sing as she had contracted to do: but as she had contracted not to sing at any other place than the one specified in the agreement, she was (and very properly in my opinion)

restrained from singing at any other place.<sup>1</sup> There all the obligations on the part of the plaintiff could have been satisfied by the payment of money, but not so those of the defendant. Here the parties are reversed. Here all the obligations of the defendants can be satisfied by paying money; but not so the obligations of the plaintiffs, who come here for the purpose in effect of compelling the defendants, by a prohibitory or mandatory injunction, to do or abstain from doing certain acts, while the correlative acts are such as the plaintiffs could not be compelled to do.

The case differs materially from that of the singer, and more resembles one decided by myself, in 1843, between Mr. Pickering and the Bishop of Ely. (a) Mr. Pickering alleged that he held an office from which he \* could not be removed, and \* 928 perhaps truly. The right reverend prelate wished to employ some other person in that capacity. Mr. Pickering filed a bill for an injunction. The case came on before me: and assuming (as I believe I did) the facts and merits to be in favour of Mr. Pickering, though without so deciding, I refused to interfere; and I am not aware that the case was carried further. It was argued by the then Solicitor-General (Sir W. FOLLETT), *Mr. Bethell*, and *Mr. Lloyd*, for the plaintiff, who had therefore as much assistance as the bar of that day could afford him; and by *Mr. Swanston*, *Mr. Kenyon Parker*, and *Mr. Faber*, for the defendant. The case was, therefore, very well discussed, and perhaps I may be excused for reading a few passages from the judgment. I said: "The plaintiff puts his case upon a legal title to an office which he says is vested in him, and upon a disturbance of him by the defendant, in the enjoyment of what the plaintiff asserts to be the legal rights belonging to that office, either carried into effect or avowedly intended. Some legal remedy or legal remedies for such a disturbance there must of course be: this is not questioned. But the plaintiff must be understood as asserting the insufficiency of any remedies merely legal, and calls upon this court to interfere by way of declaration and injunction for his protection accordingly; not asking any account against the defendant, or the performance of any act by him. Now such a case is, I apprehend, one in which the Court, before interfering, ought to be well satisfied that the ordinary

(a) 2 Y. & C. C. C. 249.

<sup>1</sup> See *Lumley v. Wagner*, 1 De G., M. & G. 604, and cases cited in the notes.



course of law, of legal remedies, is insufficient to do the plaintiff complete justice. Of this, however, I am not sure that at present I am entirely satisfied; more especially as the duties, acts, or services, of which the plaintiff's whole object is to be protected in the performance, can, upon his own showing, be regarded \* 929 as valuable to him, so far only as he may \* earn money by their performance, — so far only as their performance gives, or may give, him a title to demand certain pecuniary fees. I do not, however, place my decision on the ground of the sufficiency of the plaintiff's legal remedies." And a little further on: "Being of opinion, on the other hand, that the alleged rights of the plaintiff, in the breadth and length in which he asserts and claims and seeks to be protected in them, are of a nature neither usual nor convenient, nor without hardship or pressure on the bishop, I consider it more fit for a Court of Equity to leave the plaintiff to obtain redress by damages or otherwise in a Court of Law, than to exercise its peculiar jurisdiction by compelling the bishop specifically to submit to the practical exercise of such rights, if rights they are." And a little further on: "The leases which Mr. Pickering claims a right to prepare as well as engross, being all the leases that may be granted by way of renewal 'or otherwise' by the Bishops of Ely, of lands and hereditaments belonging to the see; there being claimed, too, such a right of access to the muniment room in the bishop's residence as this bill alleges; and the closest knowledge of all his temporal concerns connected with his see being the necessary consequence of what the plaintiff asserts, — it is obvious that it is of the highest importance to the safety of the temporal interests of the bishop for the time being, and his ordinary comfort, that the person invested with such powers should be a man not merely respected by him, not merely worthy of trust, but also personally acceptable to him. To force upon him in such characters a person however estimable, however professionally eminent, who is objectionable to him, or in whom he does not happen to confide, would, if legal, be surely hard; and, sitting in a Court of Equity, I do not feel any inclination to do it." I then proceeded to observe on the point of mutuality, and gave my opinion against the plaintiff. Now, apologizing for \* 930 \* reading so much as I have of the case, I have done so merely because the same observations are applicable here,

and are such as in substance I should have made here, if I had not found them made previously.

For the reasons that I have stated, assuming that every disputed fact is as the plaintiffs assert and not as the defendants assert, I think this not a case in which the Court ought to interfere. The inconvenience and mischief to the defendants, to say nothing of the interest of society at large, would be greater if the Court should interfere than any thing that could possibly happen to the plaintiffs by declining to interfere, especially since, as in the case of *Pickering v. The Bishop of Ely*, all that the plaintiffs require (and I use the expression not otherwise than respectfully towards them) is money, and if they are entitled to money, they will be able to recover it in the ordinary course of law. With regard to their reputation, I do not see why it should suffer because they happen to have differed with a particular railway company. It seems just as likely that the reputation of the railway company, if impeached, may suffer by differing from the plaintiffs. If the plaintiffs' reputation does, however, suffer, there is a remedy open to them at law. For these reasons I think it impossible to interfere by injunction in this case.

THE LORD JUSTICE TURNER. — It is due to the plaintiffs to state that I do not decline to interfere by injunction in this case on any supposed ground of their conduct, as contractors, being in any way impeached. Nor do I decline so to interfere on the ground of any doubt as to the legality of the contract, although I confess that I entertain some doubt upon that point.

The effect of the fifth clause of this agreement is to \*devolve upon the plaintiffs the conduct of the whole traffic \* 931 to be carried on upon the defendants' line of railway. That clause provides that the plaintiffs are at all times during the term of the contract to run and work all the trains of the railway company, and to provide for the purposes of the contract a sufficient number of efficient foremen, mechanics, engine-drivers, firemen, &c. . It thus devolves upon the plaintiffs the direction of all the traffic business of the company, which under the provisions of their Act of Parliament they have power to carry on. It devolves such business upon persons whom the legislature has not intrusted with it, and on whom it has not attached the same responsibility as it has attached upon the company. Upon the legality of such a con-

tract I entertain some doubt; but it is not on that ground, I repeat, that I rest my decision in this case.

I am of opinion that the case is not one in which the Court can properly be called upon to interfere. The bill prays, first, that the Court will put a construction upon the agreement in question; next, a declaration of such construction; and lastly, an injunction following upon such declaration. It is not, as I apprehend, one of the duties of this Court to declare the legal construction of contracts. That is the province of a Court of Law. When this Court is called upon to interfere by way of injunction in such cases, it is upon the ground that its interference is necessary to preserve the property while the legal construction of the contract is being determined by a Court of Law. This Court interferes upon the ground that irreparable injury may ensue to the property forming the subject of the contract pending the inquiry at law; but, in the present case, there is no doubt, on the one hand, that the rolling stock appertaining to the defendants' undertaking is still the \* 932 property of the \* company, though the right to use it is given by the terms of the contract to the plaintiffs (their lessees); and there is no doubt, on the other hand, that the stores, supplied by the lessees, belong to them. The question at law therefore is not a question as to the ownership of property, but a mere question of personal right to the enjoyment of it. It is, as it seems to me, a mere question of what damages are recoverable at law.

It was said that the company, having themselves broken the contract, ought not to be permitted, in equity, to enforce their rights as against the plaintiffs, but if the company have broken their contract, the remedy against them is at law in damages; the circumstance that a contract creates a cross obligation is not a ground upon which parties can be permitted to come to this Court for an injunction. The case of *Lumley v. Wagner* has been referred to during the argument; but that case, as it appears to me, is wholly different from the present. In that case the Court was called upon to prevent a singer who had been engaged by the plaintiff from singing for hire for other persons. The object of the plaintiff was to restrain the defendant from hiring herself to other persons; but, in this case, what the plaintiffs ask is to restrain the defendants from not employing them as their contractors. In

that case it was possible to enforce the contract as against the defendant, while in this case it is not.

It appears to me that if we listen to the application of the plaintiffs in this case we shall be introducing an entirely new head of equity into the practice of the Court, and be extending its jurisdiction far beyond any thing to which it has hitherto extended. On these grounds I am of opinion that this injunction should be refused entirely.

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**\* SEWELL v. ASHLEY.**

**\* 938**

1853. March 22. Before the LORDS JUSTICES.

The Master of the Rolls or a Vice-Chancellor has jurisdiction under the 15 & 16 Vict. c. 86, § 45, to make an order in chambers upon summons to administer the effects bequeathed by a married woman under a power contained in a deed.

THIS was an application made to their Lordships at the request of the Master of the Rolls for their opinion on the question whether an order might be properly made upon a summons under the 45th section of the Chancery Amendment Act, (a) for the administration of the trusts of the will of a married woman. The following were the circumstances of the case:—

By a settlement dated the 27th of August, 1845, made in contemplation of the marriage of Mr. William Cleave and Mrs. Silvester, an annuity left to Mrs. Silvester for her life by her former husband, a sum of stock, and some shares in an insurance company, which had been previously transferred into the names of the trustees of the settlement, were settled upon trust for Mrs. Silvester's separate use for her life, and after her death in the lifetime of Mr.

(a) 15 & 16 Vict. c. 86, § 45. "It shall be lawful for any person claiming to be a creditor, or a specific, pecuniary, or residuary legatee, or the next of kin, or some or one of the next of kin, of a deceased person, to apply for and obtain, as of course, without bill or claim filed, or any other preliminary proceedings, a summons from the Master of the Rolls or any of the Vice-Chancellors requiring the executor or administrator, as the case may be, of such deceased person, to attend before him at chambers, for the purpose of showing cause why an order for the administration of the personal estate of the deceased should not be granted."

388 CASE IN CHANCERY

Cleave, in trust for such person or persons, for such interest or interests, and in such manner and form in all respects as Mrs. Silvester should by deed or will (notwithstanding her coverture) appoint, and in default of such appointment and subject thereto in \* 934 trust \* for Mr. Cleave for life, and after his death for the persons who at the decease of the survivor of Mr. and Mrs. Cleave would have been entitled to Mrs. Cleave's personal estate if she had died intestate and without leaving a husband.

By a deed of separation dated the 8th of July, 1850, Mr. Cleave covenanted with the trustees of his marriage settlement, that it should be lawful for Mrs. Cleave, notwithstanding her coverture, to have, hold, possess, and enjoy for her own sole and separate use and benefit all the moneys, clothes, linen, household goods, or other goods, real and personal estate, chattels, effects of what nature or kind soever vested, contingent or reversionary, which Mrs. Cleave then had, or thereafter might have in her power, custody, or possession, or which she should at any time thereafter purchase, get, acquire, or be possessed of, or which might be bequeathed or given to her by any person or persons, and from time to time and at all times to give, bequeath, order, manage, direct, sell, or dispose of the same, or any of them in such manner to all intents and purposes as if she were a *feme sole*.

Mrs. Cleave made her will, dated the 17th of January, 1851, and thereby she appointed and gave, devised and bequeathed all her household goods and furniture, plate, linen, china, trinkets, wearing apparel, and all the residue of the personal estate of which, by virtue of any power or authority, or of any separate right of property or otherwise she was competent to dispose, unto and to the use of George Ashley, John Sewell, and two other trustees, upon trust to convert such parts thereof as they should think proper into money, and to make such investments as they should think proper, and to apply the annual income for the maintenance and education, or otherwise for the benefit of the \* 935 plaintiff \* Sarah Margaret Silvester Sewell during her minority, and to accumulate the unapplied income, if any, and after she should attain the age of twenty-one years, upon trust to convey and transfer all the same property to her heirs, executors, administrators, and assigns absolutely, and the testatrix directed that the receipts of her trustees should be sufficient discharges, and appointed the above-mentioned trustees her executors.

The testatrix died in April, 1851, and in May, 1851, administration with the will annexed was granted to George Ashley and John Sewell, limited to the right, title, and interest of the deceased in and to all such personal estate and effects as she by virtue of the settlement and separation deed had a right to appoint and dispose of and had in and by her said will appointed and disposed of accordingly, but no further or otherwise. The plaintiff by a next friend caused a summons to be served upon the executors, on which application was made for the usual order for the administration of the testatrix's estate.

*Mr. W. M. James* and *Mr. Kinglake*, for the plaintiff, contended that the case was within the 45th section of the Act. They referred to *Goodere v. Lloyd*, (a) and *Sugden on Powers*, Vol. I. p. 536.

*Mr. Roundell Palmer* and *Mr. Prendergast*, for the defendant.— If this proceeding is not regular and within the jurisdiction of the Court, the order made upon it will not be a good discharge to the trustees. It cannot be said that this is an ordinary administration suit within the meaning of the order. It is really a suit to carry into \* effect a part of the trusts of the deeds creating the \* 936 powers. Such suits have not been dealt with nor considered to fall within the same rules as administration suits. (b) This Court does not act upon the production of the probate of a will made in the exercise of a power. *Rich v. Cockell*, (c) *Lidgard v. Garland*. (d) Vice-Chancellor KINDERSLEY has in a recent case decided that the Act does not apply to a testamentary appointment of a married woman. *Re White's Estate*. (e) At all events, no order could be made in the absence of the husband.

THE LORD JUSTICE KNIGHT BRUCE.— In this case an infant legatee is by her next friend seeking in a compendious and inexpensive mode that which beyond all possibility of question she has a right to seek and obtain by a longer and more expensive mode of proceeding in this Court, and it would therefore be a matter of great regret if the convenient and useful enactment which she

(a) 3 Sim. 538.

(b) See *Court v. Jeffery*, 1 Si. & St. 105; and see *Musters v. Wright*, 2 De G. & Sm. 777.

(c) 9 Ves. 376.

(d) 1 Curties, 286.

(e) Not reported.

seeks to have applied to her case could not be so applied. I am of opinion that it would be a narrow construction of the section in question of the statute to hold that it does not extend to this case. I am of opinion that this case is within the letter and within the spirit of the statute, and as I believe my learned brother takes the same view of the question as myself, we will request the counsel to inform the Master of the Rolls that in our opinion he has jurisdiction under the 45th section of the statute to entertain this application. Whether the jurisdiction should be exercised, and to what extent, and on what conditions, and in the presence of what parties, it will be for his Honor to determine.

The Lord Justice TURNER concurred.

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\* 987

\* WILKINSON v. BEWICKE.

1853. April 19. Before the LORDS JUSTICES.

A testator, by a will made after the Wills Act came into operation, devised to trustees for 500 years all his freehold and copyhold hereditaments in the county of D. which had or might thereafter come into his possession "by inheritance" from his father, whose heir he was. Among the testator's property in the county of D., when he made his will, were one estate devised to him by his father before the Wills Act came into operation, and another which had been conveyed to him by his father by a deed of gift, and into the possession of which he entered in his father's lifetime. *Held*, that the latter estate was not subject to the trusts of the term, though without it they could not be fully performed as regarded the amounts directed to be raised under them.

THIS was a special case which came on to be heard by order originally before their Lordships.

Anthony Wilkinson, upon whose will the questions to be decided on the special case arose, and who was the eldest son and heir-at-law and customary heir of Thomas Wilkinson, deceased, by his will, bearing date the 13th of March, 1849, after bequeathing specific and pecuniary legacies, gave, devised, and bequeathed unto the defendants, Robert Calverley Bewicke and James Hall, all and singular his freehold and copyhold lands, tenements, hereditaments, and premises, situate in the county of Durham, which had or

[ 728 ]

might thereafter come into his possession by inheritance from his late father, to hold the same unto the said Robert Calverley Bewicke and James Hall and the survivor of them, and the executors, administrators, and assigns of the survivor of them, for the term of 500 years, to commence from the day next before the day of his decease, without impeachment of waste, upon the trusts and subject to the several uses thereafter declared concerning the same; and, from and after the expiration or sooner determination of the said term of 500 years, and in the mean time subject \*thereto and to the trusts thereof, he gave, devised, \* 988 and bequeathed all and singular the said trust estate and premises, upon and for such and the like uses as were thereafter mentioned, expressed, and declared in regard to the same; and he directed and declared that his said trustees and the survivor of them, and the executors, administrators, and assigns of such survivor, should stand and be possessed of and entitled to all his said freehold and copyhold lands, tenements, hereditaments, and premises situate in the said county of Durham, which had or might come to him by inheritance from his late father as aforesaid, for and during the said term of 500 years, or until the trusts concerning the same should be fully complete and ended, upon trust in case his personal estate should be found insufficient for the payment of his debts, funeral and testamentary expenses, and the payment of an annuity of 3000*l.*, which the testator gave to the plaintiff, his wife, and of the following legacies, viz. 15,000*l.* each to his two daughters, 20,000*l.* to his son Clennell Wilkinson, and also of an annuity of 200*l.* which he gave to James Hall, and of legacies of 500*l.* each to his trustees, the trustees or trustee for the time being of the will should, by and out of the rents, issues, and profits, and by sale or mortgage of a sufficient and competent part or parts of the said trust premises for all or any part of the said term, or by any other lawful and reasonable ways and means whatsoever, raise and levy a sufficient sum or sums of money (for which the testator's personal estate should be so deficient), and therewith and thereout pay or cause to be paid all his just and lawful debts, funeral and testamentary expenses, and the annuity to his said wife, the legacies to his said two daughters and to his said son Clennell Wilkinson, the annuity to the said James Hall, and the legacies to his said trustees respectively thereinbefore given and bequeathed, \* and the costs and charges of \* 989



proving and executing his said will, and upon trust, by all or any of the ways and means aforesaid, to levy, raise, and apply such sum and sums of money as should from time to time, in their or his discretion, be necessary for the maintenance and education (suitably to their expectant fortunes) of the testator's son, the defendant Anthony Wilkinson, his said daughters, the defendants Mary Ann Wilkinson and Emily Spearman Wilkinson, and his said son the defendant Clennell Wilkinson, until, as regarded the defendant Anthony Wilkinson, he should go to the university, and as regarded all the other children, until they should severally and respectively, as to sons, attain their ages of twenty-one years, and, as to daughters, attain the said age of twenty-one years or day of marriage, whichever should first happen after the testator's decease, it being his express will and meaning that none other of his freehold and copyhold estates than such as had or might come to him by inheritance from his late father, and were situate in the said county of Durham, should be liable to or charged or chargeable with any of the trusts thereinbefore expressed and declared in regard to the said term of 500 years; and, in case the whole of the said rents and profits and the moneys thereinbefore directed to be raised should not be paid or applied in, for, or towards the trusts thereinbefore declared of and concerning the same, then he directed that the surplus thereof should fall into and form part of the residue of his personal estate and effects, and be subject to the disposition thereafter contained in respect thereof.

The testator died in October, 1851, and his personal estate not specifically bequeathed, after paying thereout his funeral and testamentary expenses and debts, a legacy of 300*l.* bequeathed \* 940 to the plaintiff, his widow, \* and the legacies of 500*l.* each bequeathed to the defendants, the executors of the said will, which had been paid, amounted to about 1500*l.*; and none of the other legacies bequeathed by the testator had been paid or provided for.

The testator, at the date of his will and at his death, was the absolute owner of various estates situate in different parts of the county of Durham, and also of an estate called Clennell, in the county of Northumberland, and of no other freehold or copyhold estate.

The testator's estates in the county of Durham consisted of estates called and known by the respective names of; 1st, "The

Castle Eden estates;" 2d, "the Wilkinson family estates;" 3d, "the Spearman estates;" and, 4th, of other estates called in the special case for distinction "the purchased estates;" and such several estates were respectively acquired by the testator in manner hereinafter appearing:—

1st. As to the Castle Eden estates. These estates, which were freehold, situate in several townships and places in the eastern part of the county of Durham, and particularly described in the indentures of lease and release next hereinafter mentioned, formed a portion of the family estates in the county of Durham, which Thomas Wilkinson, the testator's father, became absolutely entitled to in fee-simple in possession in the year 1775, but were detached from the rest of such family estates. By indentures of lease and release, bearing date respectively the 20th and 21st days of January, 1819, made between the said Thomas Wilkinson, of the one part, and the testator, therein described as the eldest son and heir-apparent of the said Thomas Wilkinson, of the other \* part, Thomas Wilkinson, in consideration of the natural \* 941 love and affection which he had and bore for and towards the testator, and for making such provision for him as thereafter mentioned, conveyed the said "Castle Eden estates" unto and to the use of the testator, his heirs and assigns for ever; and immediately thereupon the testator, who had long previously attained his age of twenty-one years, entered into the possession or receipt of the rents and profits of the said "Castle Eden estates," and he continued in such possession or receipt thenceforth until the time of his death.

2d. As to the Wilkinson family estates. These estates, a small portion of which was copyhold, together with some other hereditaments which were sold by the said Thomas Wilkinson, the testator's father, in his lifetime formed the remainder of the family estates in the county of Durham, to which Thomas Wilkinson became entitled in fee-simple, in possession, in the year 1775. Thomas Wilkinson continued absolutely entitled to these estates down to the time of his death, and by his will bearing date the 18th of December, 1824, duly executed and attested for devising freehold estates, after charging all his real estate as well as so much of his personal estate as might not be specifically bequeathed by him with the payment of his funeral and testamentary expenses, debts, and the legacies thereby bequeathed, he devised and be-

queathed all his real and personal estate unto the testator therein described as his eldest son and heir-apparent for his own proper use and benefit, and appointed the testator his sole executor.

The testator, immediately upon the death of his father, entered into the possession or the receipt of the rents and profits of \* 942 the Wilkinson family estates, and \* continued in such possession or receipt until his own death, except as to some small portions of those estates which he sold; and he also, shortly after his father's death, duly proved his will in the proper Ecclesiastical Court, and soon afterwards paid all his father's funeral and testamentary expenses, debts, and legacies.

3d. As to the Spearman estates, a small portion of which was copyhold, and the rest freehold, Thomas Wilkinson was, and at his death continued to be, entitled to the reversion in fee-simple of four-fifth parts thereof subject to an estate for life in his wife, if she survived him. To the other one-fifth share the testator had become entitled under a settlement of the 3d of December, 1781, as one of the children of Thomas Wilkinson and Hannah Elizabeth his wife. Upon the death of Thomas Wilkinson, Hannah Elizabeth Wilkinson became tenant for life under that settlement, and on her death, in the year 1831, the testator became absolutely entitled in possession to the entirety of the Spearman estate as to one-fifth part thereof in his own right, as one of such children as aforesaid, and as to the remaining four-fifth parts thereof, either under or by virtue of the will of Thomas Wilkinson his father, or as his heir-at-law; and he accordingly, upon the death of his mother, entered into the possession or the receipt of the rents and profits of all the Spearman estates, and continued in such possession or receipt until his death.

4th. As to the purchased estates. These were all freehold, and consisted of property bought by the testator from different vendors as detailed in the special case.

The testator entered into the possession or receipt of the \* 943 \* rents and profits of the said purchased estates from the respective dates of the aforesaid conveyances thereof respectively to him, and continued in such possession or receipt until his death.

No freehold or copyhold lands, tenements, hereditaments, or premises, situate in the county of Durham, other than and except as hereinbefore appears, came into the testator's possession by

inheritance from his father either before or subsequently to the date of his said will.

The special case set forth a summary of the net annual value of all the testator's estates at the date of his will, showing the net annual value of the Castle Eden estates, on the 13th of March, 1849, to have been 3504*l.*, and that of the Wilkinson family estates 2101*l.*

The following was the principal question for the opinion of the Court: —

Whether by the true construction of the will of the testator Anthony Wilkinson all or any and which of his aforesaid freehold and copyhold estates in the county of Durham, hereinbefore respectively called “the Castle Eden estates,” “the Wilkinson family estates,” “the Spearman estates,” and “the purchased estates,” or any and which of the said undivided fifth parts or shares of the said Spearman estates, are or is comprised in the said term of 500 years created by the said will or subject to the aforesaid trusts thereof.

*Mr. Malins* and *Mr. Toller*, for the widow. — In *Trent v. Hanning*, (a) *Mr. Justice LAWRENCE* founded \* his judgment \* 944 partly on the ground that the testator in that case might have used the word “inheritance” in a different sense from that which it had in strict legal construction. So in the present case it is extremely unlikely that the testator should have been aware that the estates devised to him by his father had, strictly speaking, come to him by inheritance. He must be taken to have meant to include all the property which he had derived from his father, as appears clearly from the value of the estates and the amount of the charges, circumstances which have been held entitled to weight even to the extent of altering a word, although it involved no contradiction nor repugnancy to the rest of the will. *Hart v. Tulk*. (b)

*Mr. Rolt* and *Mr. Burdon*, for the oldest son of the testator, contended that there being a subject accurately answering the description, it could not be applied to any other; that had the personalty been sufficient to answer the charges, no question would

(a) 7 East, 97.

(b) 2 De G., M. & G. 300.

have been raised, and that the value of the personalty could not determine the construction.

The following authorities were also referred to : *Doe v. Haslewood*, (a) *Doe v. Bell*, (b) *Jones v. Tucker*, (c) *Hoste v. Blackman*, (d) *Napier v. Napier*, (e) *Bootle v. Scarisbrick*. (g)

*Mr. Wigram* and *Mr. Bacon* appeared for other parties.

*Mr. Malins* was heard in reply.

\* 945 \* THE LORD JUSTICE KNIGHT BRUCE. — The testator in this case was entitled to real estates, which may be considered as divided into three portions ; one he acquired by purchase in the popular sense of that expression ; another was devised to him by his father's will, but as the law then stood, he, being his father's heir-at-law, took this by descent ; the third portion his father had given to him by deed of gift in the father's lifetime several years before the date of the will. The father survived for many years the execution of that deed of gift, and under it the testator entered into possession in his father's lifetime. Having property of these three different kinds, the testator devised by this description "all and singular my freehold and copyhold lands, tenements, hereditaments, and premises, situate in the county of Durham, which have or may hereafter come into my possession by inheritance from my late father," or, as he expressed himself in another part of the will, "may come to me by inheritance from my late father." The question is, whether the language used can be held to include the estates acquired by the testator under the deed of gift, into possession of which he entered in his father's lifetime. I am of opinion that the words cannot with propriety be so construed, whatever may have been in the testator's mind when he so expressed himself or consented to the use of the language employed. It is immaterial to consider whether the word "inheritance" ought to be read as a word of art ; it being impossible to say that, the testator having had property which he acquired from his father by descent or by will, the expressions

(a) 15 Jur. 272.

(d) 6 Madd. 190.

(b) 8 T. R. 579.

(e) 1 Sim. 28.

(c) 2 Mer. 533.

(g) 1 H. L. Cas. 167.

are applicable to property taken by gift in his father's lifetime, into the possession of which he entered during his father's life. Nothing could warrant such a construction, but the impossibility of finding any other \*subject to which the words \* 946 could be applied. There is a subject to which the term can with correctness be applied, and therefore the Castle Eden estates cannot be included in the trusts of the 500 years term.

THE LORD JUSTICE TURNER. — The testator has devised thus: [His Lordship read the words.] The question is, whether, there being property which was strictly according to law taken by inheritance, any other property than that so taken can be held to be included in the devise.

It is a rule of law perfectly well established, that technical words must be construed according to their technical import, unless it can be shown by the context that another meaning was intended to be put upon them. It is also a rule, that where there is property answering the description, the context of the will must be very clear to show that other property was intended to pass than that which answers the description. This latter question was much discussed in the House of Lords in the case of *Lord Camoys v. Blundell*. (a) In that case the House of Lords held that a person not accurately described in the will was nevertheless entitled under it; but it went upon this ground, that the description in the will was not properly applicable to any person. It was assumed that if there had been a person strictly answering the description, it would not have been competent to the house to have applied the clause to another person, who did not answer the description. Looking at the context of this will I see nothing which can authorize the Court either to alter the technical import of the words or to extend the devise beyond the \*description. *Mr. Burdon* has properly argued that, if \* 947 the testator's personal estate had been sufficient to pay the charges which the testator has made upon it, it could not have been contended that the Court could have altered the will. There being property correctly answering the description, it is not competent to the Court to apply it to other property, there being nothing to show that the testator so intended.

KIDD v. NORTH.

1853. March 15. April 21. Before the LORDS JUSTICES.

A testator gave his residuary estate upon trust to pay to A. an annuity during her life, and to accumulate the surplus income till the expiration of six months after A.'s death, and then to divide the residue and accumulations into as many shares as there should be children "living" of A. and of B. who should have lived to attain twenty-one, or, in case of any of them being dead under that age, who should have left issue, and pay and apply one share to each of the children of A. and B. that should have lived to attain twenty-one, and to their respective executors, administrators, and assigns, and one share to the issue of each child who should have died under that age, leaving lawful issue. *Held*, that the word "living" was not referable to the period of distribution, but to that of the testator's death; so that each child, on attaining twenty-one, took a vested interest absolutely.

THIS case came on by order to be heard originally before their Lordships on further directions, with a petition, and the question turned upon the construction of the will of John Kidd, dated the 19th of July, 1830, whereby he declared the trusts of his residuary estates as follows:—

"Upon trust by and out of the yearly interest, dividends, and annual produce to arise therefrom to pay unto Elizabeth Kidd of Prescott, widow of my late relative William Kidd of Prescott aforesaid, surgeon, one annuity or clear yearly sum of 100*l.* for and during the term of her natural life, by two equal half-yearly payments in each year, the first payment thereof to commence and \*be made to her at the end of six calendar months next after my decease, whether my real, copyhold, and leasehold estates shall have been then sold or not; and upon further trust by and out of the yearly dividends and annual produce to arise as aforesaid from the rents and interest of my said real, leasehold, and personal estate, to pay unto Mary otherwise Maria Kidd, widow of my late relative Thomas Kidd of Liverpool aforesaid, one annuity or clear yearly sum of 50*l.* for and during the term of her natural life, by two equal half-yearly payments in each year, the first payment thereof to commence and be made to her at the end of six calendar months next after my decease, whether my said real, copyhold, and leasehold estates shall have been then sold or not; and upon further trust, after paying the several yearly

sums aforesaid, to put and place out at interest as aforesaid any surplus that shall remain of the interest, dividends, and annual proceeds, in order to accumulate; and from and after the expiration of six calendar months from the death and decease of the said Elizabeth Kidd, upon trust to pay to such of her children as shall then have attained the respective ages of twenty-one years the sum of 500*l.* each, and to retain the like sum of 500*l.* for each and every of her children who shall not then have attained that age, and to place out the same upon the like securities as aforesaid, until their respective attainments thereto, and then to pay the same to him or her respectively; and from and after the death and decease of the said Mary otherwise Maria Kidd, upon trust to pay each of the children of Thomas Kidd and Elizabeth the sum of 500*l.* within six calendar months next after her decease, and upon the youngest child of the said Elizabeth Kidd of Prescottt, attaining the said age of twenty-one years, or in case of its death prior to that age then the next youngest child attaining the said age of twenty-one years and so on upwards with respect to her children, \* it \* 949 being my intention that the division hereinafter mentioned is to take place when the last youngest child of the said Elizabeth Kidd shall have attained that age, provided the said Elizabeth Kidd shall be then dead, but not otherwise, it being my intention that the division shall not be made until six calendar months next after the decease of the said Elizabeth Kidd, upon trust to divide the then residue and accumulations into as many shares as there shall be children living of the said Elizabeth Kidd and Mary otherwise Maria Kidd that shall have lived to attain that age, or in case of any of them being dead under that age shall have left behind him or her lawful issue, and pay and apply one such equal share thereof to each of the children of the said Elizabeth Kidd and Mary otherwise Maria Kidd that shall have lived to attain that age, and to their respective executors, administrators, and assigns, and one other such equal share thereof unto the issue of each such child that shall have died under that age leaving lawful issue."

The testator died on the 4th of March, 1835, and the will and three codicils not affecting the above trusts were duly proved by John North and Ambrose Lace, the executors. (a)

(a) The case is reported on other points in 14 Sim. 463, and 2 Phil. 91.



Maria Kidd died in the lifetime of the testator, on the 13th of July, 1834, having had two children only, who were living at the death of the testator; viz., Thomas Kidd, since deceased, and Elizabeth Kidd. Elizabeth Kidd was still living, and had had five children; viz., James Kidd and William Turner Kidd, both since deceased, and Edward Taylor Kidd, Anne Atherton, \* 950 and \* Alice Beal, all of whom were living at the death of the testator John Kidd, and had respectively attained the age of twenty-one years.

The question was, whether the children took vested interests before the death of Elizabeth Kidd.

*Mr. Rolt* and *Mr. Jolliffe* were for the plaintiffs. *Mr. Follett*, *Mr. W. M. James*, *Mr. Giffard*, and *Mr. Eddis*, for the defendants.

Judgment reserved.

April 21.

THE LORD JUSTICE KNIGHT BRUCE:—In this case, as I understand the facts, all the children of Elizabeth Kidd, the annuitant of 100*l.* per annum, who were living when the testator made his will, were by that husband who is mentioned in it, are still living, and have attained majority; and all the children of Mary (otherwise Maria) Kidd, the annuitant of 50*l.* per annum, who were living when the will was made, were by that husband who is mentioned in it, are also living, and have attained majority, except one of the children who (as I believe) died after the testator's death, having, however, attained majority. The question is, whether if any of them shall die in the lifetime of Elizabeth Kidd, the annuitant of 100*l.* per annum, the share of the child so dying will devolve on the children who shall survive that lady. In my opinion the true view of the case requires that question to be answered in the negative. It seems to me that the shares of the children of each family are absolutely vested.

The word "living" used in the residuary gift means, \* 951 \* I think, "now living;" that is, the testator intended, in my opinion, to benefit not any child that Elizabeth Kidd, the annuitant of 100*l.* per annum, might have after the will, but such children only of that lady as were children of her deceased husband, the testator's relative, William Kidd of Prescott (though

of the names, ages, and number of those children the testator was probably uncertain), and to benefit not any child that Mary (otherwise Maria) Kidd, the annuitant of 50*l.* per annum, might have after the will, but such children only of that lady as were of her deceased husband, the testator's relative, Thomas Kidd of Liverpool. Nor can the testator be supposed to have intended that the share of a child, dying after majority, leaving issue, should be lost to that child and his issue in favour of other children, when that was not to be the case with the share of a child dying in minority leaving issue.

The rules of grammar and idiom seem also to require that "living" should be understood as "now living," for the will says "children living of the said Elizabeth Kidd and Mary otherwise Maria Kidd, that shall have lived to attain that age, or in case any of them being dead under that age shall have left behind him or her lawful issue." The description of "living" being expressly ascribed to a child not living, unless the word "living" be read as meaning "now alive."

The testator might perhaps have expressed himself more neatly and clearly. But I am satisfied that we are fulfilling his intention by holding the vesting of all the shares (including that of the dead child) to have taken place (in the events that have happened) finally and absolutely.

THE LORD JUSTICE TURNER. — This is a question of some difficulty upon the construction \* of a will. John Kidd, \* 952 the testator, by his will, after directing the conversion of his real and personal estate into money, and the investment of the proceeds by his trustees on government or real securities, has declared the following trusts. [His Lordship read them.]

The question is, whether any shares of the residue were vested in the children of Elizabeth and Mary (otherwise Maria) Kidd, who attained twenty-one, and afterwards died in the lifetime of Elizabeth, or whether the interests of the children of Elizabeth and Mary, who attained twenty-one, were contingent on their surviving Elizabeth. I am of opinion that the children of Elizabeth and Mary who attained twenty-one, and afterwards died in Elizabeth's lifetime, took vested interests.

The question seems to me to depend mainly upon the effect to be attributed to the word "living" in the direction to divide the

residue into as many shares as there should be children living of Elizabeth and Mary. If the word "then" had occurred in this clause, and the direction had been to divide into as many shares as there should be children "then living" of Elizabeth and Mary, the terms of contingency in this, the leading direction of the will, would have been so clear and positive that the Court could hardly, I think, have been warranted in departing from them, or construing the disposition otherwise than as throughout importing contingency. But the word "then" is not found in this clause in connection with the word "living," and the question therefore is more open upon the context, whether the word "living" was intended by this testator to import contingency. Looking at the context of this will, I do not think that it was.

This testator, in the commencement of the disposition  
\* 953 \* of his residue, had been referring to the successive youngest children of Elizabeth dying under twenty-one. And I think that he has used the term "children living," on which the question of contingency arises, in contradistinction merely to the children so dying, and that the word living is merely expletive. There are several reasons which have led me to this conclusion. 1st. There is the absence of the word "then" in connection with the word "living." This testator has shown by other parts of his will that he knew the use of the word "then." He has used it in the gift of the legacies of 500*l.* to the children of Elizabeth who should then have attained twenty-one; and again, in this very clause, provided Elizabeth shall be then dead; and yet he does not attach it to the word living in this the most material part of his disposition. 2d. The word "living" is introduced only in the direction to divide, and not in the direction to pay, which is absolute and unqualified, the direction being to pay to the children who shall live to attain twenty-one. It would be inconsistent to construe the latter direction as absolute, and the former as importing contingency. It is true that this inconsistency would be equally well removed by reading the words "who shall live" to mean "who shall have lived," but the Court would of course lean to the construction which favours the vesting rather than to that which imports contingency. 3d. The direction is to pay to the children who shall live to attain twenty-one, "their executors, administrators, and assigns;" and, although these superadded words might, in the event of Elizabeth surviving the period when her youngest

child should attain twenty-one (an event which the testator has in terms referred to as possible, and which must therefore be so treated by the Court), be well accounted for by the period of six months, which in that event was to elapse before the \* division, I see nothing which, upon the supposition of the \* 954 disposition being contingent, can account for these super-added words, in the event of Elizabeth predeceasing the period of her youngest child attaining twenty-one. And lastly the disposition is in favour of a class to be composed of children attaining twenty-one, and of the issue of children dying under twenty-one. According to the terms of the disposition the issue of the children would, as I apprehend, take vested interests upon the deaths of their parents. It is not a probable intention to ascribe to the testator that the interests of some of the class should be vested, whilst the interests of others of the class were in contingency.

My opinion therefore is, that the children who attained twenty-one in the life of Elizabeth, and have since died, took vested interests.

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### HEATH v. LEWIS.

1853. May 4. Before the LORDS JUSTICES.

A bequest of an annuity to an unmarried woman (if living and unmarried at the death of a prior annuitant) for the term of her natural life, if she should so long remain unmarried: *Held*, to be a limitation, and not a bequest upon a condition subsequent, and therefore determinable upon marriage.<sup>1</sup>

THIS case came on on further directions, and was by order heard by their Lordships originally. The question arose on the effect of a bequest in the will of Henry Heath, dated the 24th of December, 1842.

The will, after directing payment by the trustees of (among other life annuities) an annuity of 100*l.* per annum to one Mrs. Martha Bentick, for her life, contained the following further declaration of trust: —

<sup>1</sup> See 2 Jarman Wills (3d Eng. ed.), 40; *West v. Kerr*, 6 Ir. Jur. 141.

“ And if Miss Mary Ann King, the niece of the said  
 \* 955 \* Martha Bentick, shall be living and unmarried at the  
 decease of the said Martha Bentick, do and shall, as a fur-  
 ther mark of my sense of the obligation Mrs. Martha Bentick has  
 conferred on me by her great attention and care, pay to the said  
 Mary Ann King the sum of 2*l.* 10*s.* per calendar month (making  
 30*l.* a year) during the term of her natural life, if she shall so long  
 remain sole and unmarried ; the first payment thereof to be made  
 at the end of one calendar month after the decease of the said  
 Martha Bentick.”

The testator died on the 28th of August, 1848. Mary Ann King  
 survived Martha Bentick, and afterwards, on the 4th of November,  
 1848, married a Mr. Turnbull. The question was, whether the  
 annuity had determined.

*Mr. Chandless* and *Mr. Caldecott*, for the plaintiff.

*Mr. Greene*, for Mr. and Mrs. Turnbull. — This is a bequest  
 upon a condition subsequent, which, being against public policy, is  
 inoperative. If the bequest had been to the annuitant for her life,  
 if she should not marry, or if she should continue unmarried, it  
 would be clearly one subject to a condition subsequent, the word  
 “ if ” implying a condition. *Marples v. Bainbridge*, (a) *Rishton*  
*v. Cobb*. (b) If so, can the introduction of the words “ so long,”  
 which add nothing to the meaning, have the effect of changing the  
 conditional bequest into a limitation ? Sir JAMES WIGRAM has, in  
*Morley v. Rennoldson*, (c) pointed out the difference between the  
 civil law and our own on this subject, and he there refers to Lord  
 THURLOW’s judgment in *Scott v. Tyler*. (d) The residuary  
 \* 956 legatees must satisfy the \* Court that a gift to a person for  
 life, if she so long remains single, is the same as a gift  
 during such time as she shall remain single ; whereas the distinc-  
 tion between the effect of these two forms of expression is well  
 settled and established. In *Lloyd v. Lloyd*, (e) Lord CRANWORTH  
 adverts to the distinction between the effect of such a form of gift  
 when applied to an unmarried person and when applied to the tee-

(a) 1 Madd. 590.

(d) 2 Dick. 712.

(b) 9 Sim. 615 ; 5 M. & C. 145.

(e) 2 Sim. N. S. 263.

(c) 2 Hare, 570.

tator's widow. *Webb v. Grace* (a) is distinguishable from such cases as the present, by the particular frame of the covenant in that case. [He also referred to *Ex parte Dickson*, (b) *Wren v. Bradley*. (c)]

*Mr. Elmsley* and *Mr. Younge* were for the trustees.

THE LORD JUSTICE KNIGHT BRUCE. — It must be agreed on all hands that it is, by the English law, competent for a man to give to a single woman an annuity until she shall die or be married, whichever of these two events shall first happen. All men agree that if such a legatee shall marry, the annuity will thereupon cease. But this proposition has been advanced, — a proposition which, if true (and I do not deny its truth), is perhaps not creditable to the English law, — that if a man give an annuity to a woman who has never married for life, and afterwards declare that, if she shall marry, the annuity shall be forfeited, the condition is void, and she may yet marry as often as she will, and retain her annuity. Such is the state of our English law on this subject said, and perhaps truly, to be ; and the question argued before us has been, to which of these two classes the gift in this will belongs, being a gift of an annuity to a single lady “during the term of her natural \* life, if she shall so long remain unmarried,” this \* 957 language being the technical and proper language of limitation as distinguished from condition, long known to the English law and familiar to us all. Both upon precedent and reason, upon principle and authority, I am of opinion that this is a limitation as distinguished from a condition, and that the annuity ceased when the lady married.

THE LORD JUSTICE TURNER. — This testator has given to a legatee “an annuity of 80*l.* during the term of her natural life, if she shall so long remain unmarried.” There are two constructions which may be put upon these words : it may either be a gift to her for life, defeated by a condition, or it may be a gift to her so long as she remains unmarried, that is, for life, if she be so long unmarried ; and the question, therefore, is purely one of intention, in which of the two senses the words were used. Upon that ques-

(a) 2 Ph. 701.

(b) 1 Sim. N. S. 43.

(c) 2 De G. & S. 49.

tion I think there can be no doubt upon this will, because there is a complete expression of the testator's intention at the beginning of the gift, where he says, "If Miss Mary Ann King shall be living and unmarried at the decease of the said Martha Bentick." It is, therefore, clear that the annuitant was not intended to take unless she was unmarried at the death of Martha Bentick. There must be a declaration that the annuity has ceased.

1853. May 5. Before the LORDS JUSTICES.

Under an assignment to creditors by a debtor of all his stock in trade, book and other debts, goods, securities, chattels, and effects whatsoever, except the wearing apparel of himself and his family: *Held*, that a contingent interest in the residuary estate of a testator (to which the debtor was entitled in the event of his sister dying without a child) passed.  
*Pope v. Whitcombe*, 3 Russ. 124, observed upon.

THIS was an appeal from the refusal by the Master of the Rolls of a motion for payment into Court of a sum of 93*l.* 16*s.* 10*d.* consols, and for an injunction.

By a composition deed, dated the 8th of July, 1831, and made between John Park of the first part, Charles Moore and Edward Rawlings of the second part, and the several persons whose names were thereunto subscribed, and seals affixed, creditors of John Park, of the third part, it was witnessed, that in consideration of the release thereafter contained, John Park assigned unto Charles Moore and Edward Rawlings all and singular the stock in trade, book and other debts, goods, securities, chattels, and effects whatsoever and wheresoever, of or belonging, or due or owing to John Park, or wherein or whereto he was in any wise interested or entitled (except the wearing apparel of John Park and his family), together also with all profits and produce of the thereby assigned property and premises, and all securities, books, accounts, vouchers, and writings and documents whatsoever relative thereto, and

<sup>1</sup> S. C., 17 Beav. 221.

all the right, title, interest, benefit, property, claim, and demand whatsoever, of him John Park, of, in, and to or in respect of the same, to hold, receive, take, and enjoy all and singular the furniture, stock, debts, effects, and other the premises thereby assigned, or intended so to be, unto and by Charles Moore and Edward Rawlings, their executors, administrators, and assigns, absolutely, together with full power for them, as the true and lawful attorney or attorneys of John Park, to ask, demand, and receive

\* and by action, suit, or otherwise to sue for and receive \* 959 all the said goods, stock, debts, and effects thereby assigned.

And it was thereby declared and agreed that the said stock in trade, debts, goods, securities, chattels, effects, and other the premises assigned, were so assigned unto Charles Moore and Edward Rawlings upon trust as soon as conveniently might be, to sell and dispose thereof as therein mentioned, and to stand possessed of the moneys to be received under the trusts; upon trust in the first place to pay the costs and expenses therein mentioned, and in the next place thereout to retain and reimburse all advances made to John Park, or otherwise for or in respect of carrying on his business as hereinafter mentioned, with interest at the rate of 5l. per cent per annum on all advances to be made by the trustee or trustees out of their own funds, and subject thereto upon trust to pay and discharge all the debts of the parties thereto of the second and third parts ratably, without preference, as far as the said moneys would extend, and to be in full discharge of the debts of the said respective creditors, and if there should be any surplus of the said trust moneys and premises after satisfying the trusts aforesaid, then upon trust to pay over and assign the same unto John Park, his executors, administrators, and assigns. And in the indenture was contained a power for the trustees to allow John Park to continue his business, or to collect on account of the trustees all or any of the debts thereby assigned; and also a power for the trustees for the time being, if so they thought proper themselves to carry on the said business, so long as they should think prudent for the benefit of the trust estate. And John Park thereby (amongst other things) covenanted with the trustees to do and execute all such further and other acts and things relating to the premises as the trustees or their counsel should reasonably require \* for the better and more effectually assuring \* 960 the said furniture, stock, debts, effects, and premises thereby



assigned upon the trusts aforesaid; and that John Park would at all times thereafter, upon every reasonable request, attend the trustees, and disclose and explain his whole property and effects intended to be thereby assigned, and all circumstances attending the same. And it was thereby further witnessed that in consideration of the assignment and covenants of John Park thereinbefore contained, the aforesaid creditors, parties thereto of the second and third parts, each as well for himself as his respective partners, did remise, release, and for ever quit-claim unto John Park, his heirs, executors, and administrators, and also him and them, and his and their estate and effects of and from all debts due and owing to them the said creditors, parties thereto, from John Park, and all actions, suits, claims, and demands whatsoever at law or in equity, or otherwise howsoever.

The question was, whether the deed extended to and comprised an interest to which John Park became entitled in part of the personal estate of his father Joseph Park, deceased, under the following circumstances: Joseph Park by his will, dated the 11th of August, 1820, bequeathed all his residuary estate to his brother Thomas Park and John Wylie, upon trusts for sale, and after payment of debts to invest the residuary estate, upon trust as to one moiety for John Park, and as to the other moiety thereof for his sister, the testator's daughter, Mary Ann Park. The testator died shortly after the date of his will.

By an indenture of settlement dated the 26th of May, 1826, and made between Mary Ann Park of the one part, and Thomas Park, since deceased, and the defendant John Peter Gassiot of the \* 961 other part, Miss Park \* assigned unto Thomas Park and John Peter Gassiot all that the said moiety or half part or share of her the said Mary Ann Park, of and in the residue of the estate and effects of Joseph Park, her late father, on certain trusts for her and her children. And in case there should be no child or children of Miss Park living at the time of her death, nor the issue of any child or children dying in her lifetime, leaving lawful issue living at her death, or being such children or child, or issue, he, she, or they should die before he, she, or they should have acquired a vested interest in the said trust estate and premises; then upon trust to pay, assign, and transfer the said trust estate and premises, or the securities upon which the same should from time to time be invested, unto John Park, his executors, adminis-

trators, or assigns, absolutely for his and their own use and benefit.

In 1844 John Park died, and in June, 1848, Mary Ann Park died without having been married.

The present suit was instituted by one of the creditors, who were parties to the composition deed, on behalf of himself and all other the creditors of John Park who were entitled to the benefit of the composition deed. The bill sought a declaration that the moiety theretofore of Mary Ann Park deceased, and settled by the indenture of the 26th of May, 1826, of and in the residuary estate of the testator Joseph Park, deceased, became and then was subject to the trusts of the indenture of the 8th of July, 1831, and ought to be applied and disposed of accordingly. The bill also sought to have the requisite accounts taken, and the trust moneys and premises applied in a due course of administration, in paying to plaintiff and the other creditors of John Park deceased, who were or might be entitled to the benefit of the composition deed of July, \* 1831. It further sought an injunction to restrain the \* 962 defendant John Peter Gassiot from paying, assigning, or disposing of, otherwise than under the order and direction of the Court, the moneys, stocks, funds, and securities, subject to the trusts, and the appointment of a receiver.

The defendant Gassiot admitted a balance of 93*l.* 16*s.* 10*d.* to be in his hands, and the motion which was the subject of appeal, was for payment of this amount into Court, and for an injunction as prayed by the bill.

*Mr. Lloyd* and *Mr. Hallett*, in support of the appeal. — The Master of the Rolls held that he was bound by the decision in *Pope v. Whitcombe*. (a) We submit, however, that if there was nothing more in the deed affecting the question than appears upon the report of that case, the decision cannot be supported. There was perhaps in that case some context interpreting and confining the words of the deed otherwise than according to their ordinary signification. But the cases are moreover distinguishable; for here the exception of the wearing apparel is stronger than any thing which appears to have been in the deed, in *Pope v. Whitcombe*, to show that the word effects must be taken in its most exclusive sense.

(a) 3 Russ. 124.

[ 747 ]

They also referred to *Arnold v. Arnold*, (a) *Parker v. Marchant*. (b)

*Mr. R. Palmer* and *Mr. Eddis*, for the respondents. —  
 \* 963 \* The words in *Pope v. Whitcombe* were larger than those in the present case, for they included the word "estate" as well as the word "effects," which is alone used here. The word "estate" is of larger import than the word "effects." The word "effects" in its ordinary signification means tangible property, and not *choses in action*.

THE LORD JUSTICE KNIGHT BRUCE. — I need not give any opinion upon the construction of the instrument which was before the Court in *Pope v. Whitcombe*. The Master of the Rolls considered that the cases could not be distinguished, and therefore that he was bound to put on the deed now before the Court the limited construction which was put upon the assignment in *Pope v. Whitcombe*. I do not, however, consider that we are bound, because the instrument in *Pope v. Whitcombe* was construed in a particular manner, to construe in the same way that now before us. It is impossible to say what interpreting, restricting, or correcting context there may have been in the former instrument without seeing every word of it. We do see every word that the instrument in this case contains, and thus much is plain, that the words here, according to their proper and technical interpretation, do include this property. That, however, would be nothing if there were a restrictive context. I have looked in vain for such a context, and not finding it, I must hold that the words ought to be understood according to their proper and technical construction as including this property.

THE LORD JUSTICE TURNER. — I think that there is a plain distinction between this case and *Pope v. Whitcombe*. It is true that the general words there were the same as in this case, or even more extensive. But in the present case there is an  
 \* 964 exception \* of the assignor's wearing apparel. What is the effect of that exception? Why, that all the assignor's property, with that exception, was intended to pass. A similar circum-

(a) 2 M. & K. 365.

(b) 1 Y. & C. C. C. 290.

stance was relied upon in *Hotham v. Sutton*, (a) where Lord ELDON said: "With respect to the second question, the doctrine appears now to be settled in this Court that the words 'other effects,' in general mean effects *ejusdem generis*. I cannot help entertaining a strong doubt, whether this testatrix, if asked whether she meant effects *ejusdem generis*, or contemplated the share of all which she had considered her effects in the will, would not have answered, that the latter was her meaning. Her expression is conclusive upon that. Money cannot be represented as *ejusdem generis* with plate, linen, and household goods. The express exception of money out of the 'other effects,' shows her understanding that it would have passed by those words; that express words were required to exclude it; and by force of the exclusion in the excepted article, she says she thought that the words of her bequest would carry things not *ejusdem generis*. This disposition must therefore be taken to comprehend all that she has not excluded, which is money only."

Giving no opinion upon *Pope v. Whitcombe*, I think that in this case the contingent interest passed.

Order made.

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\* In the Matter of NORMAN'S TRUST, and of the 10 \* 965  
& 11 Vict. c. 96.

1853. May 6. Before the LORDS JUSTICES.

By a marriage settlement, a moiety of the settled fund was assured in trust after the death of the wife, if she died in the lifetime of the husband, to such uses as she should appoint, and, in default of appointment, to such person or persons as at her decease would have been entitled to the clear residue of her personal estate under the Statute of Distributions, in case she had died intestate and without being married. On the death of the wife, in the lifetime of the husband, without having exercised the power, *held*, that the children of the marriage were entitled.<sup>1</sup>

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(a) 15 Ves. 326.

<sup>1</sup> See 1 Jarman Wills (3d Eng. ed.), 488; *Mitchell v. Colls*, 1 Johns. 674; *Coventry v. Lauderdale*, 10 Jur. 793; *Maugham v. Vincent*, 9 L. J. N. S. Ch. 329; 4 Jur. 452; *Corley v. Lord Stafford*, 1 De G. & J. 238; *Pratt v. Mathew*, 22 Beav. 328.

THIS was an appeal from the decision of Vice-Chancellor KIN-  
DERSLEY on a petition under the Trustee Relief Act.

By a settlement dated the 22d of April, 1842, and made in con-  
templation of the marriage of Anna Elizabeth Ewart and George  
Bethune Norman, it was declared that the trustees thereof should  
hold the sum of 19,469*l.* 14*s.* 4*d.* 3*l.* per cent consols, lately stand-  
ing in the name of Miss Ewart, which had been transferred into  
the trustees' names, upon trust as to one moiety thereof, and the  
dividends and interest, and income thereof, to pay the said divi-  
dends, interest, and income to Miss Ewart for her life, for her  
separate use ; after her death to pay the said dividends, interest,  
and income to Mr. Norman for his life, with remainder in trust for  
such of the children of Mr. Norman and Miss Ewart, as they or  
the survivor of them should appoint ; and in default of such  
appointment, then upon trust for the children in manner therein  
mentioned ; and in case there should be no child or issue of the  
said George Bethune Norman by Anna Elizabeth Ewart, who  
should become entitled to a vested interest in the said moiety  
under the above-mentioned trusts, then upon trust for the survivor

of them the said George Bethune Norman and Anna Eliza-  
\* 966 beth Ewart. And as to the other moiety \* and the interest  
thereof, upon trust to pay the dividends, interest, and in-  
come thereof to Anna Elizabeth Ewart for her life, for her separate  
use, without power of anticipation ; and in case the said George  
Bethune Norman should die in the lifetime of the said Anna  
Elizabeth Ewart, then from and after his decease the said last-  
mentioned moiety, and the interest, dividends, and annual produce  
thereof should be in trust for the said Anna Elizabeth Ewart, her  
executors, administrators, and assigns, for her and their absolute  
use and benefit ; but in case the said Anna Elizabeth Ewart should  
die in the lifetime of the said George Bethune Norman, it was  
thereby agreed and declared that the trustees should from and  
immediately after the decease of the said Anna Elizabeth Ewart,  
leaving the said George Bethune Norman her surviving, stand and  
be possessed of the said last-mentioned moiety, upon trusts for  
such person or persons, for such ends, intents, and purposes, and  
in such parts, shares, and proportions, manner and form, in all  
respects as the said Anna Elizabeth Ewart should, notwithstanding  
coverture, direct or appoint ; and in default of any such direction  
or appointment and as to so much and such part and parts of the

same trust money or stocks of or concerning which no direction or appointment should be made, upon trust for, and for the benefit of, such person or persons as at the decease of the said Anna Elizabeth Ewart would have been entitled to the clear residue of the personal estate of the said Anna Elizabeth Ewart, under the statute for the distribution of the personal estate of intestates, in case the said Anna Elizabeth Ewart had died intestate, and without being married.

The marriage took place, and there were three children of Mr. and Mrs. Norman, two of whom survived \* Mrs. Nor- \* 967 man, who died in 1851, leaving her husband George Bethune Norman her surviving and without having made any appointment of the last-mentioned moiety.

The trustees paid the trust fund into Court under the Trustee Relief Act, and the children presented a petition for payment of it to them, but the Vice-Chancellor held that they were not entitled, and they now appealed from his decision.

*Mr. Bacon and Mr. Stevens*, for the appellants.

*Mr. W. N. Warren*, for the next of kin of Mrs. Norman, other than her children.

*Mr. W. M. James and Mr. Greene*, for the trustees.

The following cases were referred to: *Maberley v. Strode*, (a) *Bell v. Phyn*, (b) *Doe v. Rawding*, (c) *Coventry v. Lord Lauderdale*, (d) *Maugham v. Vincent*. (e)

THE LORD JUSTICE KNIGHT BRUCE. — It may perhaps be said here as Lord ELLENBOROUGH said in a case (g) before him, that the question is one for a grammarian rather than a lawyer, or which a schoolmaster might decide as well as a Judge. I think that grammar is in favour of the lady's children, and that the expression "without being married" means without having a husband at the time of her death, not without ever having had a husband.<sup>1</sup> Still the

(a) 3 Ves. 450.

(b) 7 Ves. 458.

(c) 2 B. & A. 441.

(d) 10 Jur. 793.

(e) 4 Jur. 452.

(g) *Fenny v. Ewestace*, 4 Mau. & S. 60.

<sup>1</sup> See 1 Jarman Wills (3d Eng. ed.), 486-489; *Hall v. Robertson*, 4 De G., M. & G. 781.

rules of grammar must give way to the rules of good sense,  
 \* 968 and where a \* reasonable interpretation of the whole instrument requires that grammar should be departed from, it must be, and constantly is, departed from. With the greatest deference to the learned Judge from whom this case comes, it appears to me that there is no such occasion here, that grammar and sense go together, and that we ought not to separate them. It seems to me that the intention of the instrument was to exclude only the husband in the events which have happened; and except that he was not to take, all was to go according to the course of law, as if the lady had died unmarried, whether as a widow or otherwise. I am of opinion that the children were intended to take.

THE LORD JUSTICE TURNER.—This case must be decided in accordance with the intention of the instrument. The object was to exclude the husband. I think, with my learned brother, that the children are to take.

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\* 969 \* In the Matter of the Trust of JANE STEPHENSON deceased, and of the 10 & 11 Vict. c. 96.

*Ex parte* STEPHENSON.

1853. May 8. Before the LORDS JUSTICES.

Upon the marriage of one of several residuary legatees under her father's will, the intended husband and wife assigned to trustees all and every the sum and sums of money, legacy and legacies, and other personal property then due and payable, or belonging to, or to become due and payable to the intended wife under or by virtue of her father's will, "or otherwise howsoever," upon trusts for her separate use for her life, without power of anticipation, with trusts in remainder in favour of the children of the marriage. By the next witnessing part of the same settlement, it was agreed, that in case any real or personal property should, during the coverture, be given or bequeathed to the wife, the husband should settle it upon trust so that the wife should have the sole power of disposing of the same: *Held*, that a legacy bequeathed by another will to the wife after the marriage was not subject to the trusts for the children, the latter witnessing part of the settlement showing that the former must be read in a restricted sense.

[ 752 ]

THIS was an appeal from the decision of the Master of the Rolls upon a petition under the Trustees' Relief Act; and the question was whether a mortgage executed by a husband and wife of an interest to which the wife became entitled under a will was effectual, which question depended upon another, namely, whether, according to the true construction of their marriage settlement, the property was comprised in the second or the third witnessing part of that deed.

The following were the circumstances of the case: —

Charles Ambrose Stephenson, by his will dated the 19th of June, 1812, gave the residue of his real and personal estate to trustees; upon trust, after paying certain annuities which had determined, for all and every of his children, equally to be divided amongst them share and share alike, the share and interest of every son to be paid or transferred at his age of twenty-five years, and the share and interest of every daughter to be paid and transferred at the age of twenty-one years, or on the day of her marriage, which should first happen.

\* The testator died in June, 1812, leaving six children \* 970 surviving him, of whom Louisa, afterwards the wife of William Field, and Jane Stephenson were two. All the daughters attained twenty-one, and the sons twenty-five years.

The executors of Charles Ambrose Stephenson assented to the bequest of the testator's residuary estate.

The settlement on which the question arose, and which was executed on the 1st of May, 1820, in contemplation of the marriage of Miss Louisa Stephenson and Mr. William Field, was made between William Field of the first part, Louisa Stephenson of the second part, and the petitioner Charles Doyley Stephenson and James Field of the third part. It recited the intended marriage, and that William Field was possessed of a policy of assurance on his own life for the sum of 1000*l.* effected in the Equitable Assurance Office. It also recited that, under and by virtue of the will of Charles Ambrose Stephenson, Louisa Stephenson was entitled to certain legacies, sum or sums of money, or other personal estate; but the particulars and amount of the same, so far as the same had not then been paid or transferred to her, was not then fully ascertained. And it recited that upon the treaty of the said marriage, it had been proposed and agreed that for making some provision for Louisa Stephenson and the issue (if any) of the



same marriage the sum of 1000*l.* so secured or made payable on the death of William Field as aforesaid, and also the said sum or sums of money and other personal property to which Louisa Stephenson was entitled under the will of her father, Charles Ambrose Stephenson, or otherwise howsoever, should be settled and assured upon the trusts thereafter expressed. By the first witnessing part it was witnessed that in pursuance and part performance

of the agreement, and for the nominal consideration \* 971 \* therein mentioned, William Field granted unto the petitioner Charles Doyley Stephenson and James Field, their executors, administrators, and assigns, the said policy of assurance for 1000*l.*, and the sums of money secured thereby upon the trusts, from and immediately after the solemnization of the said then intended marriage, thereafter expressed and declared. By the second witnessing part it was witnessed that in further pursuance and performance of the said recited agreement, and for the nominal considerations therein mentioned, she, the said Louisa Stephenson, with the privity and approbation of the said William Field, did grant, bargain, assign, transfer, and set over unto the petitioner Charles Doyley Stephenson and James Field, their executors, administrators, and assigns, all and every the sum and sums of money, legacy and legacies, and other personal property then due and payable, or belonging to, or to become due and payable to, Louisa Stephenson, under or by virtue of the last will and testament of Charles Ambrose Stephenson, her deceased father, or otherwise howsoever, and all interest, proceeds, or accumulations (if any) of the said respective sums of money and premises, or any of them, to hold the same premises unto the petitioner Charles Doyley Stephenson and James Field, their executors, administrators, and assignees, until the said intended marriage, and from and after the solemnization thereof, upon the trusts thereafter expressed, declared, and contained concerning the same. These trusts were for the separate use of Louisa Stephenson for her life, without power of anticipation, remainder to James Field for life with remainder to the children of the marriage. The deed contained a third witnessing part, whereby it was declared and agreed, and William Field did thereby, for himself, his executors, and administrators, covenant and agree with the petitioner Charles Doyley Stephenson and \* 972 \* James Field, their executors and administrators, that in case the said intended marriage should be solemnized, and

any property, real or personal, or mixed, should at any time during the said intended coverture be given or bequeathed to, or in any manner howsoever vest in, Louisa Stephenson, then and in that case he, the said William Field, as far as he lawfully might or could, would, or should, either alone, or in concurrence with the said Louisa Stephenson, and at the costs and charges of such property, do all such acts whatsoever as should be necessary and proper for settling the same property for all the estate and interest of Louisa Stephenson, or of William Field, as her husband therein, in such manner that the said Louisa Stephenson might have the sole power of disposition over the same notwithstanding her coverture, and in such manner that in the mean time and until such disposition should be made, the said property, and the rents, profits, dividends, and interest, income and produce thereof might belong to, and to be held in trust for, the said Louisa Stephenson, for her sole and separate use, notwithstanding her coverture; and also in the mean time, and until such settlement should be made, the said William Field, as far as he might be interested in any such property, should stand and be seised or possessed of and interested in the same, upon trust for the sole and separate use of the said Louisa Stephenson, his said then intended wife.

There had been two children only of the marriage; viz., Frederick Field, since deceased, and the petitioner Mary Louisa Field, who attained her age of twenty-one on the 30th of November, 1843.

Jane Stephenson, one of the daughters of the testator Charles Ambrose Stephenson, by her will dated the 26th of April, 1843, after making certain specific and pecuniary \* bequests, \* 978 gave and bequeathed all the residue of her personal estate and effects in possession, reversion, remainder, and expectancy unto her brothers, the petitioner Charles Doyley Stephenson and Augustus Stephenson, and her sisters Louisa Field and Emma Harmer, equally to be divided between or among them, their executors, administrators, and assigns respectively, share and share alike; and she appointed the petitioner Charles Doyley Stephenson and Augustus Stephenson executors of her will. She died on the 11th of May, 1843, and her will had been proved by Augustus Stephenson alone.

By the mortgage-deed in question, which was dated in February, 1845, and executed by William Field and Louisa his wife of the

first part, Louisa Okey Stephenson of the second part, and George Peart of the third part, reciting the settlement and the will of Jane Stephenson, and reciting that there was then standing in the names of William Harmer and the petitioner Charles Doyley Stephenson the sum of 13,580*l.* 8*s.* old South Sea annuities, being the then existing residue of the personal estate of the testator Charles Ambrose Stephenson, and that the share of Jane Stephenson in such residue would, on the decease of Louisa Okey Stephenson, the testator's widow, amount to the sum of 2846*l.* 11*s.* 6*d.* like annuities, of which the sum of 711*l.* 13*s.* 8*d.* like annuities, being one-fourth share thereof, would be the property of and receivable by William Field and Louisa his wife, or William Field in right of his wife, it was witnessed that in consideration of 450*l.* to William Field and Louisa his wife, paid by George Peart, William Field and Louisa his wife, and each of them, thereby assigned to George Peart, his executors, administrators, and assigns, all the right, title, and interest of them the said William Field \* 974 and Louisa his wife, and \* each of them, in and to the bequest and share of residue to and of the said Louisa Field in and by the last will and testament of the said Jane Stephenson deceased, bequeathed to her as therein mentioned, subject nevertheless to a proviso for redemption upon payment of the above-mentioned sum of 450*l.* with interest.

By the order under appeal it was declared, that the share of Louisa Field in the estate of the late Jane Stephenson passed by the assignment contained in the settlement of the 1st of May, 1820, and was subject to the trusts, by that indenture declared for the benefit of Louisa Field and her children; and that the interest of Louisa Field in the same was not affected by the indenture of the 25th of February, 1845. And it was ordered that the sum of 592*l.* 6*s.* 4*d.* bank 3*l.* per cent annuities, standing in the name of the Accountant-General, in trust, "In the matter of the trust of Jane Stephenson, deceased," should be transferred to the trustees of the settlement, to be held by them upon the trusts thereby declared for Louisa Field and the children of her marriage with William Field.

*Mr. Rolt* and *Mr. Speed* were for the appellants.

*Mr. W. M. James*, *Mr. Osborne*, and *Mr. Cole*, for the respondents.

[ 756 ]

THE LORD JUSTICE TURNER. — With great respect to the Master of the Rolls I have arrived at a different conclusion from his Honor in this case. The terms of the second operative part of the marriage settlement are these. [His Lordship read them.] If that had stood alone, there could have been little doubt as to its extending to all future property. But it must be construed with the rest of the instrument, and \*in a subsequent part \*975 of it there is an express agreement between the parties, and there is a covenant on the part of the husband to this effect. [His Lordship read the covenant set out above for the settlement of future property.] Now, if the construction contended for by the respondents could be maintained, the effect of the second operative part would be such that there could be no personal property to which the subsequent operative part could apply. The effect of that construction, therefore, would be to strike out of the deed all the words of the subsequent operative part relating to personal estate. That is a consequence which ought to be avoided if any other reasonable interpretation can be put upon the words. It is also to be observed that the second operative part follows the words of the recital.

It appears to me that the second operative part should be confined to the property to which Mrs. Field was entitled at the time of the settlement.

THE LORD JUSTICE KNIGHT BRUCE. — The property in question was derived under the will, and merely under the will, of a person who was alive when the settlement was executed, and when the marriage took place. In that state of things I give no opinion, whether if the third operative part had been out of the deed this property would have been affected by the instrument, for *omni considerata scriptura* I am unable to conclude that this lady, having been persuaded by her husband to mortgage this property, was not able to do it.

The order was discharged, and an account directed of what was due upon the mortgage.

## DOWNS v. BUCHANAN.

1853. April 26. May 9. Before the LORDS JUSTICES.

Freehold estates over which a testator has a general power of appointment, and which he appoints by his will, are assets for payment of his simple-contract debts, but are only applicable for that purpose after all the testator's own property has been previously so applied.<sup>1</sup>

THESE causes came on by order to be heard, upon further directions, by their Lordships originally.

John Fleming, the testator in the causes, being seised and possessed of freehold and personal estates, and having a general power of appointment over other freehold estates, by his will, dated the 25th of November, 1842, devised his freehold estates and appointed those subject to the power. He also bequeathed divers specific and pecuniary legacies.

Under a reference, directed by the decree at the original hearing, dated the 25th of November, 1847, the Master, by his report of the 2d of August, 1852, found that the testator's personal estate was insufficient for the payment of his debts, and the \* 977 question now was, whether, (a) \* under the 11 Geo. 4 and 1

<sup>1</sup> See 2 Jarman Wills (3d Eng. ed.), 587 *et seq.*; Williams v. Lomas, 16 Beav. 1; Hawthorn v. Shedden, 3 Sm. & Giff. 305; Wilday v. Barnett, L. R. 6 Eq. 193.

(a) 11 Geo. 4 and 1 Will. 4, c. 47. And whereas it is not reasonable or just that, by the practice or contrivance of any debtors, their creditors should be defrauded of their just debts, and nevertheless it hath often so happened that where several persons having, by bonds, covenants, or other specialties, bound themselves and their heirs, and have afterwards died seised in fee-simple of and in manors, messuages, lands, tenements, and hereditaments, or had power or authority to dispose of or charge the same by their wills or testaments, have, to the defrauding of such their creditors, by their last wills or testaments, devised the same or disposed thereof in such manner as such creditors have lost their said debts; for remedying of which, and for the maintenance of just and upright dealing, be it therefore further enacted, that all wills and testamentary limitations, dispositions, or appointments already made by persons now in being, or hereafter to be made by any person or persons whomsoever, of or concerning any manors, messuages, lands, tenements, or hereditaments, or any rent, profit, term, or charge out of the same, whereof any person or persons, at the time of his, her, or their decease, shall be seised in fee-simple, in possession, reversion,

Will. 4, c. 47, and 3 & 4 Will. 4, c. 104, the appointed freehold estate was subject \* to the payment of the testator's \*978 debts, including those by simple contract, and in what order as between the appointees and the specific devisees and legatees.

*Mr. Willcock* and *Mr. Shebbeare*, for the plaintiff, who was the residuary legatee and devisee; and *Mr. Bacon* and *Mr. Boyle*, for parties entitled under specific devises. — The appointed real estate is liable to the payment of the simple-contract debts, and is so liable *pari passu* with the devised real estate. By Sir JOHN ROMILLY's Act, 3 & 4 Will. 4, c. 104, real estate is placed upon the same footing as personal estate with respect to its being subject to the payment of a testator's debts. But in the case of personal estate it has long been settled that, by exercising a general power of appointment by will, a testator subjects the appointed property

or remainder, or have power to dispose of the same by his, her, or their last wills or testaments, shall be deemed or taken (only as against such person or persons, bodies politic or corporate, and his and their heirs, successors, executors, administrators, and assigns, and every of them with whom the person or persons making any such wills or testaments, limitations, dispositions, or appointments, shall have entered into any bond, covenant, or other specialty, binding his, her, or their heirs), to be fraudulent, and clearly, absolutely, and utterly void, frustrate and of none effect; any pretence, colour, feigned or presumed consideration, or any other matter or thing to the contrary notwithstanding.

3 & 4 Will. 4, c. 104. That from and after the passing of this Act, when any person shall die seised of or entitled to any estate or interest in lands, tenements, or hereditaments, corporeal or incorporeal, or other real estate, whether freehold, customaryhold, or copyhold, which he shall not by his last will have charged with or devised subject to the payment of his debts, the same shall be assets to be administered in Courts of Equity for the payment of the just debts of such persons, as well debts due on simple contract as on specialty; and that the heir or heirs at law, customary heir or heirs, devisee or devisees of such debtor, shall be liable to all the same suits in equity at the suit of any of the creditors of such debtor, whether creditors by simple contract or by specialty, as the heir or heirs at law, devisee or devisees of any person or persons who died seised of freehold estates was or were before the passing of this Act liable to in respect of such freehold estates, at the suit of creditors by specialty in which the heirs were bound: Provided always, that in the administration of assets by Courts of Equity under and by virtue of this Act all creditors by specialty, in which the heirs are bound, shall be paid the full amount of the debts due to them before any of the creditors by simple contract or by specialty, in which the heirs are not bound, shall be paid any part of their demand.

to the payment of all his debts. With regard to the order of application, it has been laid down, that a general power makes the subject of it the donee's absolute estate. It must contribute therefore ratably with other property specifically devised and bequeathed. *Lord Townshend v. Windham*, (a) *Bainton v. Ward*, (b) *Holmes v. Coghill*, (c) *Jenney v. Andrews*. (d)

*Mr. Russell* and *Mr. Karlake*, for the appointee. — The appointed real estate is not within the Act, for it never was the estate of the testator. He had a mere power of designating who should be the owner of it. At all events, the appointed estate is not liable until the whole of the actual property of the testator is exhausted.

They referred to *Westfaling v. Westfaling* (e) and *Troughton v. Troughton*. (g)

\* 979     \* *Mr. Boyle*, in reply.

THE LORD JUSTICE TURNER. — The first question is, whether the appointed estates are at law liable to the payment of any of the debts. The Statute of 3 & 4 William & Mary, c. 14, which was re-enacted by the 11 Geo. 4 & 1 Will. 4, c. 47, provides thus: — [His Lordship read it.] The language of these statutes clearly includes estates subject to a general power of appointment in the testator, and under their provisions appointed estates are liable to the payment of specialty debts.

The next question is, in what order these estates ought to be applied in payment of the debts. The debts, it would seem, ought to be paid out of the property of the testator. His personal estate is primarily liable for the payment of them, but personal estate over which he has merely a power is not his personal estate. Property, whether personal or real, over which a testator has a general power, is liable for his debts, — as to the personal estate for all his debts, and as to the real estate at all events for his specialty debts, but such property is not the personal or real estate of the testator. The mode in which the Court dealt with a case of this description

(a) 2 Ves. 1.

(d) 6 Madd. 264.

(b) 2 Atk. 172.

(e) 3 Atk. 460.

(c) 7 Ves. 499.

(g) *Ib.* 656.

in *Bainton v. Ward*, (a) as appears from the declaration in the decree in that case, which is set out in the note to *Holmes v. Coghill*, (b) seems to me to show that personal estate, or real estate appointed by a testator, is to be applied only in aid of the assets which are \* really the property of the testator. I \* 980 think therefore that the personal estate, and the real estate including property specifically devised or bequeathed, must be applied before the appointed estate. The further and remaining question is, whether under the provisions of Sir JOHN ROMILLY'S Act the appointed estate can be made liable to simple-contract debts. I have felt much doubt upon that point; but, looking attentively at the words of the Act, I think that appointed real estate must be considered liable to its operation. A liberal construction has been put upon it, and I am not disposed to give it a narrow interpretation. The words are, "when any person shall die seised of or entitled to any estate or interest in land." In my opinion the Court ought to hold that a person having a power over land has an interest in land within the meaning of the statute. I consider, therefore, that the appointed real estate is subject to the payment of the simple-contract debts.

THE LORD JUSTICE KNIGHT BRUCE. — On whatever grounds it was originally so held, it is and has for a long time been the settled law of the country, that if a man having a power, and a power only, over personal estate to appoint it as he will, exercises the power by a testamentary appointment, the property becomes subject in a certain order and manner to the payment of his debts, whatever may be the intention or absence of intention upon his part. Not only in point of principle and reason, but of precedent and authority, I apprehend that the same rule applies to real estate, where it is subject to a general power exercised by will.

The next question is as to the order of application. I always considered it clear, and the authorities cited confirm \* me in the opinion, that resort is to be had to property \* 981 of that description only in favour of the creditors, to prevent

(a) 2 Atk. 172; and see also 2 Ves. Sen. 2, and *Daubeny v. Cockburn*, 1 Mer. 639, where Sir W. GRANT said that creditors had "only a general equity to have what is appointed to a volunteer considered as assets if wanted for payment of debts."

(b) 7 Ves. 502.



their being unpaid; and therefore that such property should not be resorted to until all the testator's estate, in a more accurate sense of the word, has been exhausted in payment of debts. That I take to be the rule, and the course of administration. Specific legatees must if necessary suffer, as well as every other claimant of an interest in property which is strictly the testator's.

The next question is, how far the appointed estate is liable to simple-contract debts. Without looking minutely at the question upon the construction of Sir JOHN ROMILLY's Act, if that Act had done nothing more than to declare that devised real estates, of which a man is seised in fee, should be liable to simple-contract debts, I think that it would have become at once the duty of the Court, acting upon the analogy and principle of the law as to personal estate, to declare and decide that appointed real estate is liable to whatever debts an estate in fee-simple is liable to. In either way of viewing the case, whether dissenting or not dissenting from the construction put upon the Act by my learned brother, I think that this appointed property is liable in its right order to the payment of simple-contract debts.

. 1853. May 25. Before the LORDS JUSTICES.

By an antenuptial settlement, the father of the husband conveyed freehold hereditaments to the use of trustees during the life of the wife, in trust for her separate use, subject to a proviso, whereby it was declared that, if a separation should take place by reason of any disagreement between the husband and wife, or otherwise, the rents and profits should, from the time of such separation, during the joint lives of the husband and wife, be paid to the husband: *Held*, that the proviso was in the nature of a condition, and not of a limitation; and that it was void, as being contrary to public policy.<sup>2</sup>

THIS was an appeal from the decision of Vice-Chancellor Wood dismissing a claim.

<sup>1</sup> S. C., 17 Jur. 584; 22 L. J. Ch. 841.

<sup>2</sup> See 2 Jarman Wills (3d Eng. ed.), 12; *Merryweather v. Jones*, 4 Giff. 499; 10 Jur. N. S. 290; 12 W. R. 524; 10 L. T., N. S. 62; *Webster v. Webster*, 4 De G., M. & G. 437; *Anon.* 3 K. & J. 332.

By an antenuptial settlement, which was dated the 10th of July, 1839, Thomas Cartwright, the father of Henry Cartwright the intended husband, assured certain freehold hereditaments to the use of himself, his heirs and assigns, until the marriage, and immediately after the marriage to the use of a trustee, his executors, administrators, and assigns, for the term of 100 years, upon the trusts thereafter mentioned, with remainder to the use of Thomas Cartwright and his assigns for his life, with remainder to the use of George Keen, his executors, administrators, and assigns, for a term of 600 years, to commence from the death of Thomas Cartwright, upon the trusts thereafter declared, and subject thereto to the use of Moses Cartwright and Robert William Hand, during the life of Ellen Grimes the intended wife; in trust (subject to the provision for the determination of such trust thereafter contained, and to the payment of interest upon two sums therein mentioned) to pay the rents and profits to Ellen Grimes, the intended wife, for her life, for her separate use, without power of anticipation. And it was thereby agreed that such rents and profits should be applied by her for the benefit of herself, and also for the support, maintenance, and education of the children (if any) of the marriage, with remainder to the use of Henry Cartwright and his assigns \* for his life without impeach- \* 983  
ment of waste, with remainder to the use of trustees to preserve contingent remainders, with remainder to the use of the first and other sons, and of the first and other daughters of the marriage successively in tail male, with remainder to the use of Thomas Cartwright in fee.

The deed contained the following proviso, upon which the question turned: " Provided always, and it is hereby further declared and agreed, by and between the parties to these presents, that in case a separation shall take place, by reason of any disagreement or otherwise, between the said Henry Cartwright and Ellen Grimes, after the solemnization of their said intended marriage, then and in such case the rents, issues, and profits of the said hereditaments and premises so limited in use to the said Moses Cartwright and Robert W. Hand and their heirs, during the natural life of the said Ellen Grimes in remainder expectant upon the decease of the said Thomas Cartwright, and subject to the aforesaid two several terms of years as aforesaid, shall from the time of such separation and thenceforth during the joint mutual lives of the said Henry

Cartwright and Ellen Grimes (but subject and without prejudice to the said two terms or such one of them and the trusts thereof as shall be capable of being exercised in the events which may happen) be paid to or shall be permitted to be received and taken by the said Henry Cartwright and his assigns, to and for his and their own use and benefit, instead of being paid to the said Ellen Grimes for her sole and separate use as hereinbefore directed, but without prejudice to the right of the said Ellen Grimes to receive such rents and profits for the remainder of her natural life, in case she shall happen to survive the said Henry Cartwright, subject nevertheless to the aforesaid terms of 100 years and 600 \* 984 years, and the trusts thereof. \* Provided also, and it is hereby further declared and agreed, that if the said Ellen Grimes shall at any time hereafter incur any debt or debts for clothes or paraphernalia, or shall against the will or injunction or without the permission of the said Henry Cartwright, incur any other debt or debts on any account whatsoever, or be the means of entailing any loss or damage upon the said Henry Cartwright; and the said Henry Cartwright shall give to the said Moses Cartwright and Robert William Hand, their heirs or assigns, or other the trustee or trustees for the time being, notice in writing, and shall also advance to such trustee or trustees reasonable proof of a demand, or of a loss made upon or incurred by him, for the payment of any such debt or debts, losses or damages, so incurred or entailed by her, the said Ellen Grimes as aforesaid, then and in such case the said trustees or trustee shall stand and be possessed of and interested in all and singular the benefits intended for the said Ellen Grimes by this settlement, or such part thereof respectively as may be rendered available for the purposes of the indemnity hereinafter mentioned, in trust, as an indemnity and for the protection of the said Henry Cartwright, his heirs, executors, and administrators, against the payment of such particular debt or debts, losses or damages, out of his own individual estate and effects, and all costs and charges incurred or sustained by him by reason or in consequence thereof, and that until satisfaction of every such debt or debts, losses or damages, whereof notice and proof shall have been so given by the said Henry Cartwright, and such costs and charges as aforesaid, the said trustees or trustee, for the time being, acting in the trusts hereinbefore declared, shall withhold or retain out of the said benefits intended for the said

Ellen Grimes, and so available as aforesaid, such sum or sums as shall be requisite to satisfy such debt or debts, losses or damages, costs, and \* charges. And in case the said Henry \* 985 Cartwright, his heirs, executors, or administrators, shall pay the same, then shall and do reimburse the said Henry Cartwright, his heirs, executors, or administrators, the amount which he or they shall have so paid, together with all costs and charges which he or they may have incurred in relation thereto."

There was no issue of the marriage. Up to the year 1846 the plaintiff and his wife resided together; but in the beginning of 1846 the wife went to reside with her mother at Derby, and she and the plaintiff had from that period up to the present time lived in a state of separation. In June, 1850, the plaintiff commenced proceedings in the Ecclesiastical Court against his wife for restitution of conjugal rights. The wife replied to those proceedings by allegations of cruelty and adultery, and prayed a divorce *a mensa et thoro*; but subsequently the allegations of cruelty were by the Ecclesiastical Court ordered to be expunged. On the 26th of June, 1851, a divorce *a mensa et thoro* was pronounced by the Ecclesiastical Court. The plaintiff and his wife, during all the proceedings in the Ecclesiastical Court, lived, and they still continued to live, separate and apart from each other.

Thomas Cartwright, the father of the plaintiff, died on the 26th of April, 1851. On his decease the plaintiff applied to the trustees to pay to him the rents, issues, and profits, of the settled hereditaments; and on their refusal he filed the present claim.

On the 7th of March, 1853, the claim came on to be heard, and was dismissed with costs, on the ground that, independently of the question whether the provision in the event of a separation was valid or not, the separation \* was of such a kind, \* 986 and had taken place under such circumstances, that the husband could not avail himself of it for the purpose of claiming the benefit of the provision. From this dismissal the plaintiff appealed.

Their Lordships desired that in the first instance the argument might be addressed exclusively to the question of the legality of the proviso.

*Mr. Russell* and *Mr. T. H. Terrell*, for the appellant. — The views of Courts of Equity as to the validity of arrangements con-

templating a separation between husband and wife have of late years been considerably modified. *Wilson v. Wilson*. (a) And in the present case there is a circumstance which with reference to provisions determining interests on bankruptcy has been considered material; namely, that the settlement is not one made by the person with respect to whom the event is to happen, but is a settlement made by another person of his own property. This, as regards public policy, has always been considered an important distinction. The settlement was of the father's property. Being master of the subject-matter of the settlement, he had a right to say upon what conditions he would settle it. Nor is the condition contrary to public policy or illegal. It might be the means of inducing the wife so to conduct herself as to make a separation undesirable. The provision is not illegal, because among its consequences there may by possibility be a bad one. Such reasons would prove that an ordinary remainder after an estate for life was illegal, as it gives to the remainder-man a motive for hastening the death of the tenant for life. The limitation in this case, so

\* 987 far from holding out an inducement to \* separation, does the contrary. Lord ELDON's reasoning (b) proceeded upon the incapacity of the wife to enter into such a contract. He could not see how a husband and wife, having undertaken certain duties, could contract to put an end to the relation, and determine the discharge of those duties towards one another and their children. That principle does not apply to a provision made by a stranger.

[THE LORD JUSTICE TURNER. — In *St. John v. St. John* (c) Lord ELDON does not put the case upon the incapacity of the wife to contract, but upon public policy.]

Even admitting this to be open to such an objection, although we submit that it is not, still the provision is not a condition, but a limitation to the separate use of the wife until her death, or until the death of her husband, or until their separation. On any one of these events happening the special limitation to the separate use terminates, and the husband takes the income as he ought to do, being by law bound to support the children.

(a) 1 H. L. Cas. 538.

(b) *Westmeath v. Salisbury*, 5 Bli. N. S. 329.

(c) 11 Ves. 526.

They also referred to the following cases: *Scolastica's Case*, (a) *Bateman v. Ross*, (b) *Cocksedge v. Cocksedge*, (c) *Vandergucht v. de Blaquiére*, (d) *Jacobs v. Amyatt*, (e) *Wilson v. Mushett*, (g) *Egerton v. Lord Brownlow*. (h)

*Mr. Daniel* and *Mr. Amphlett*, for *Mrs. Cartwright*.—The difficulty arising from the want of capacity of the wife to contract has been long since surmounted by the intervention of a trustee, and the modern cases do not \* turn upon any such \* 988 difficulty, but upon the grounds of it being contrary to public morality that there should be any pecuniary inducement held out to a husband and wife to fail in the discharge of their duties to one another, and that the law will not permit in any case the separation of husband and wife to be made the subject of an antenuptial contract. There is no ground for the argument that this is a limitation. It is a condition.

They referred to *Durant v. Titley*, (i) *Rodney v. Chambers*, (k) *St. John v. St. John*, (l) *Egerton v. Lord Brownlow*. (m)

*Mr. C. M. Roupell* and *Mr. Bowring*, for the trustees.

*Mr. Russell*, in reply.

THE LORD JUSTICE KNIGHT BRUCE.—The first question is, whether the limitation in favour of the husband is in the nature of a remainder, or of a condition destructive of the particular estate. It appears to me plainly in the nature of a condition destructive of the particular estate, and not a limitation to await its natural termination; and if, therefore, the limitation by way of condition destructive of the particular estate is one of an illegal nature, or contravening the policy of the law (the same idea in

(a) *Newis v. Lark*, Plowd. 403; and see *Mary Portington's Case*, 10 Co. 41 b.

(b) 1 Dow, 235.

(e) 1 Madd. 376 n.

(c) 14 Sim. 244; 5 Hare, 397.

(g) 3 B. & A. 743.

(d) 5 M. & C. 229.

(h) 1 Sim. N. S. 464, since reversed by the House of Lords; see 4 H. L. Cas. 1.

(i) 7 Price, 577.

(l) 11 Ves. 526.

(k) 2 East, 283.

(m) 1 Sim. N. S. 464; but see 4 H. L. Cas. 1; S. C., on appeal.

other terms), I apprehend that it is void ; that it is as if it had never been ; and that the invalidity of it does not effect the validity of the other provisions in the same instrument, to which there is no such objection.

Now, I apprehend the theory of the law to be, that a  
 \* 989 \* man and his wife cannot live in a state of separation from each other (in the only sense, or in either of the only senses, in which that term can possibly be understood here) without some failure on the part of one or both in the performance of duties in the fulfilment of which society has an interest. Here certain rights in property have been conferred by an antenuptial settlement on the intended husband and the intended wife, in the event of the marriage taking place, subject to a proviso for materially varying those rights in a manner favourable to the husband, if a separation, by reason of any disagreement or otherwise, should take place. Understanding that term as I have already stated, I am of opinion that such a proviso is against public policy, and therefore void. This renders it unnecessary to go into the particular facts of the case.

THE LORD JUSTICE TURNER. — There are two questions in this case : first, the question on the construction of this deed, whether this is a limitation, or whether it is by way of condition determining the estate ; and, secondly, if it be a condition, what is the effect of that condition ?

By the deed, the estate is vested in the trustees during the life of the wife, in trust, subject to the provision for the determination of the trusts thereafter contained, to pay the rents and profits to the wife for and during her life ; and the provision thereafter contained is, that in case a separation shall take place, by reason of any disagreement or otherwise between the husband and wife after the solemnization of the marriage, then and in such case the rents, issues, and profits shall be paid to the husband during the remainder of the joint natural lives of the husband  
 \* 990 and the wife. Now, if this be construed to be \* a limitation, the effect of that construction of the deed would be, to leave undisposed of by the deed the interest after the determination of the estate limited to the wife until the separation,—to leave undisposed of the interest in remainder during the joint lives. Of course, that is a construction one would not be inclined ordinarily

to put upon a marriage settlement, purporting to dispose of all the interests in the property comprised in that deed. The language of the deed does not import that any such construction could probably be contemplated by the parties, for the limitation is distinct to the trustees, subject to the proviso for determining the estate, and there is a distinct proviso for determining it. I feel, therefore, no doubt that this is a life-estate, with a condition for determining that estate.

Then we come to the second question, What is the effect of that condition? It was very fairly admitted in argument that the condition would be bad if contained in a deed entered into between the husband and wife after the marriage; but it was said that it was, nevertheless, good in a deed entered into between the husband and wife and the father of the husband antecedent to and upon the occasion of the marriage, in contemplation of the marriage between the parties. In order to see whether that is so, it is necessary to consider why it is that the condition would be bad if entered into between the husband and wife after the marriage. If it is clear that the reason why the condition would be bad if entered into between the husband and wife after the marriage is, the policy of the law, founded upon the relation which exists between the husband and wife, and the importance to society of maintaining that relation between them,—if that be the principle upon which the condition would be invalid if entered into in a deed after marriage, what distinction can there \* be \* 991 where the provision is contained in a deed entered into with reference to marriage, and when the marriage state is the condition of the parties contemplated by them at the time of the execution of the deed? Now, that a condition of this description is against the policy of the law is tolerably clear. In the case of *Brown v. Peck*, (a) there was a gift to a woman of an annuity of a certain amount, if she lived with her husband; but if she lived separate from him and with her mother, she was to have a larger annuity. It was held that the condition was bad, as being *contra bonos mores*; and the woman was held entitled to the larger annuity. And in the case of *Westmeath v. Westmeath*, (b) I find Lord ELDON expressing himself in these words: “I apprehend that any instrument which provides for a present separation, and which

(a) 1 Eden, 140.

(b) Jac. 126.



prospectively looks to the parties living together again, and then to a future separation, that such a deed, so far as it provides for that future separation, will never be carried into effect." These cases, I think, show that it is the policy of the law which renders these conditions bad. The appellant, however, relied upon another case in the House of Lords, *Bateman v. Ross*; (a) but that was a case in which there had been a separation between the parties at the time when the arrangement was made; and in a suit between them there was a reference to arbitration, and the award was, that a certain annuity should be paid to the wife, provided they should so long continue separate and apart from each other; that is to say, that the annuity to the wife should continue as long as the separation continued, there being a separation at the time the deed was entered into. That case, therefore, does not in the least degree militate against what is to be found in *Westmeath v.*

\* 992 \* *Westmeath* and the other cases which Lord ELDON dealt with when he held that provisions which have reference to future separations are against the policy of the law.

An argument was, however, attempted to be founded on this distinction: it was said this was not a settlement by the husband on the wife, but by the father of the husband. I take it that, in general, no person can derive any interest under the fraudulent act of another, and that this rule equally applies to an act in fraud of the law as to an act in fraud of another party. It does not seem to me, therefore, that any valid distinction can be founded on the circumstance of this being a settlement made by the father.

Upon all these grounds, I am clearly of opinion that this condition is altogether void. The appeal must be dismissed with costs.

(a) 1 Dow, 235.

## \* CROLY v. WELD.

\* 998

1853. May 30 &amp; 31. Before the LORDS JUSTICES.

A testatrix bequeathed all her property to trustees upon trust to secure thereout a life annuity to her niece, to be paid to her half-yearly, for her own use, independently of all control, and directed that after the niece's death the principal should revert to her father and his children, but that, during her life, "the placements," so far as regarded the niece's income, should be well secured, and the funds not moved without the niece's consent as well as that of her trustees; and she directed that the surplus of the income, after payment of the annuity, should go to the niece's father for his use and that of his other children, but the whole was to be at the disposal of the niece, under the advice of the trustees, to insure the payment of certain pecuniary legacies. The assets were insufficient to pay the annuity and all the legacies in full: *Held*, that the annuity was payable out of the capital.<sup>1</sup>

THIS was an appeal from the decision of Vice-Chancellor STUART, upon an administration claim filed by an annuitant under the will of Mrs. Elizabeth Croly, dated the 12th of January, 1850; and the question was, whether the annuity ought to abate, there being a deficiency of assets to pay all the legacies. The will was thus expressed: "I, Elizabeth Croly, in this my last will and testament bequeath all the property I die possessed of in my own right and that of my late sister in bonds, securities, or other values in trust to my brother, the Rev. Dr. Croly, to Gordon Weld of Twickenham, and to Gustavus Fauche of Paris, and those three persons are to secure out of those sums a life annuity of five thousand francs a year to my niece, Jemima Susan Croly, to be paid to her half-yearly, to her own use, independently of all control, and that after Jemima's death, the principal reverts to her father and his children; but that during her life the placements, as far as regards Jemima's income, be well secured, and the funds not moved without Jemima's consent, as well as that of her trustees. The overplus of the income after the annuity of five thousand francs is to go to Dr. Croly for his use and that of his other children, and he can help Jemima; I expect he will this present year. The whole is to be at the disposal of Jemima, under the \* advice \* 994 of the trustees, to insure the payment of as follows: to my

<sup>1</sup> *Re Baker, Baker v. Baker*, 7 De G., M. & G. 681; *Wright v. Callender*, 2 De G., M. & G. 652, and cases cited in note (1); *Birch v. Sherratt*, L. R. 2 Ch. Ap. 644.

kind friend the Vicomte D'Estampes a souvenir of one thousand francs for a little tour in Switzerland next summer, to brighten some of those hours for him of which his kindness to me has gloomed so many. Then a plain funeral, 50 francs for the ground for ten years (quite long enough, as I cannot be buried in my mother's grave till five years pass); then there are some 20 or 30 francs at Montmartre; there will be 500 or 600 francs, doctor, servants; and some presents; and I count on Mr. Fauche and Mr. Weld for all, as they will have money in their hands."

The Vice-Chancellor decided that the annuity was payable only out of the income of the estate.

*Mr. Follett* and *Mr. Karslake* supported the appeal.

*Mr. Cairns* was for the respondent.

*Mr. Bilton*, for the trustees.

*Mr. Follett*, in reply.

The following cases were cited: *Foster v. Smith*, (a) *Wroughton v. Colquhoun*, (b) *Ex parte Wilkinson*, (c) *Wright v. Callender*, (d) *Heron v. Stokes*, (e) *Kerr v. Middlesex Hospital*. (g)

THE LORD JUSTICE TURNER. — The Court has had the advantage of having this case more fully argued than it was before the Vice-Chancellor, and we have availed ourselves of the interval \* 995 since \* the case was opened yesterday to look not only into the cases cited, but others. The general rule is, that if there be a clear gift of a life-interest and of a reversion, and the estate proves insufficient, each party, the tenant for life and the reversioner, must bear the loss in proportion to his interest; but that if there is a gift of an annuity and a residuary gift, the annuity takes precedence, and the whole loss falls on the residuary legatee. The question upon this will is, whether this is a gift of a life-interest to Miss Croly, and afterwards of the reversion, or

(a) 2 Y. & C. C. C. 193; 1 Ph. 629.

(b) 1 De G. & Sm. 36.

(c) 3 De G. & Sm. 633.

(d) 2 De G., M. & G. 652.

(e) 2 Dr. & War. 89.

(g) 2 De G., M. & G. 576.

whether it is a gift of an annuity to Miss Croly and of the residue to Dr. Croly and the other children. I confess that I entertained some doubt at first, but on consideration I am satisfied that this is a gift of an annuity and of a residue.

The testatrix in the first place has not directed any particular fund or sum to be set apart to provide for the annuity, but has directed that her trustees are to secure out of the funds mentioned a life-annuity of 5000 francs for Jemima, a trust which overrides the whole estate. After her death "the principal reverts to her father and his children." The word "reverts" is very peculiar, and shows that the fund to be taken for the annuity was to be taken out of something into which it is to go back. But there is nothing into which it can go back except the residue. I think that when she mentions "the overplus," she was referring to the fact that the whole property subject to the annuity was to belong to Dr. Croly and the other children; and that when she says "out of the fund," her meaning was that the fund was to be taken to secure the annuity, and that what was left of it was to fall into the residue. The true construction appears to me to be that the parties are placed by the will in the situation of annuitant and residuary legatee, and not in that of tenant for life and reversioner.

\* The word "placements" at first created a difficulty in \* 996 my mind, but on looking at the whole context, I am satisfied that the testatrix meant nothing by it except to give the annuitant control over the fund by which the annuity was to be secured, and that it is not inconsistent with the intention that the annuity should be paid in full. *Wright v. Callendar* (a) is a strong authority on the subject.

THE LORD JUSTICE KNIGHT BRUCE. — This case was so slightly argued, and so little authority was referred to, before the Vice-Chancellor, that I hardly consider myself as differing from him. If the will had ended with the gift of the annuity, there would have been no question but that, however great or small the income of the testatrix's estate might be, the annuity must have been paid in full to the last farthing of the property. If so, the question may be put thus: Does the subsequent language show a clear

intention otherwise? For if a clear intention be shown in an earlier part of the will, that can only be displaced or changed by an intention equally clear in another part. My opinion is, that if there is any thing in the rest of the will derogating from the intention to be collected from these words, it does no more than create a doubt, and the doubt is not sufficient to prevail against the clear effect that would have been given to the words of the gift standing alone. I therefore think that this annuity must be paid in full.

1854. July 15, 19, 22. November 21. December 9. Before the Lord Chancellor Lord CRANWORTH.

The owner of shares in a benefit building society gave a mortgage security on leaseholds for sums advanced to him by the society in respect of his shares: he subsequently gave notice of his desire to redeem the mortgaged premises, and a difference having arisen as to the terms of redemption, he filed a claim. The Lord Chancellor made a decree for redemption, directing calculation of the longest possible duration of the society at the date of the notice, having regard to the net assets of the society and to the monthly subscriptions and redemption money still continuing payable, and to the number of 100l. shares to be provided for, and charging the plaintiff as a present debt with all subscriptions and redemption money which would become payable by him assuming the society to endure for the whole of the calculated period, and crediting him with the amount of bonus payable at the date of the notice to withdrawing members.<sup>1</sup>

The provisions as to arbitration contained in the 27th section of the Act 10 Geo. 4, c. 56, and which are incorporated into the Act 6 & 7 Will. 4, c. 32, do not apply to questions such as those raised on the above claim, the determination of which depended partly on the construction of the rules of the society and partly on the meaning of the mortgage-deed and the mode of giving effect to it.<sup>2</sup>

THE plaintiff in this suit, Thomas Brandon Fleming, was the owner of fifteen shares in the Camberwell Building and Invest-

<sup>1</sup> See *Smith v. Pilkington*, 1 De G., F. & J. 120; *Archer v. Harrison*, 7 De G., M. & G. 404; *Farmer v. Smith*, 4 H. & N. 196, and note at the end of the case in Am. ed.; *Sparrow v. Farmer*, 26 Beav. 511; *Matterson v. Elderfield*, L. R. 4 Ch. Ap. 207; *Barker v. Bigelow*, 15 Gray, 130.

<sup>2</sup> See *Farmer v. Giles*, 5 H. & N. 753; *Reg. v. Trafford*, 4 El. & Bl. 122.

ment Society, which commenced business on the 6th November, 1843; (a) he had \*mortgaged to the society certain \* 998

(a) The society was established in 1843, under the provisions of the Act 6 & 7 Will. 4, c. 32, intituled, "An Act for the Regulation of Benefit Building Societies;" and the following are such portions of its rules as are referred to in the arguments and judgment above given.

VII. *Subscriptions and Mode of Payment.*—That every person entering this society, on or before the third monthly meeting, shall pay the sum of two shillings and sixpence per share, as entrance money; and after that period shall pay such sum per share, as entrance fee, as the directors shall appoint, until the directors shall fix upon a greater amount as a bonus. That every member of this society shall, on the first monthly meeting, commence paying his or her subscription money, or sum of eight shillings and sixpence per share, for each and every share he or she may hold, and shall afterwards continue to pay his or her subscription money, of eight shillings and sixpence per share, with all fines that may be due from him or her, on the day of every succeeding monthly meeting, until the objects of the society have been fully accomplished; such payments to be made to the secretary during the first two hours of meeting, or at such other hours as the directors may appoint; and every member neglecting to pay his or her subscription shall be fined for each share as follows: fourpence for the first month, eightpence for the second month, one shilling for the third month, one shilling and fourpence for the fourth month, one shilling and eightpence for the fifth month, two shillings for the sixth, and three shillings and sixpence for each subsequent month: and any member not having executed a mortgage to the society, as hereinafter mentioned, continuing to neglect the payment of his or her monthly subscriptions until the fines incurred thereby shall equal all the moneys actually advanced by him or her, exclusive of the entrance fees, shall thereupon be expelled the society, and forfeit all his or her interest therein. That if any member shall be in arrear in respect of his or her subscription or fines for more than one month, every payment that shall afterwards be made by such member, if not sufficient to discharge the whole thereof, shall be applied first to the liquidation of what shall be owing for the first month in which he shall have been in arrear, and then in discharge of the arrears of each succeeding month. That each member shall contribute annually sixpence to the postage fund.

VIII. *Admitting Members after Commencement.*—That any person entering this society after the third monthly meeting, or already being a member thereof, and taking up or subscribing for an additional number of shares, shall pay the full amount of his or her subscriptions for such share or shares from the commencement of the society to the period when such person shall become a member of this society, or, already being a member thereof, to the period when such member or members shall subscribe for an additional share or shares, together with such further sum as the directors may, from a calculation of the profits, deem reasonable, either in one payment, or in such instalments as the directors may think fit. That whenever the directors shall have determined the amount of such instalments, the same shall be paid with, and in addition to, the monthly

leasehold property as a security for the repayment of sums  
 \* 999 advanced to him \* by the society in respect of his shares ;

subscriptions, which shall thenceforth become payable in respect of each new share ; and should such person or persons neglect or fail in the payment of the instalment, he or she shall be liable not only to the payment of the fines imposed for the non-payment of subscription, but also shall be liable to the payment of fines for the non-payment of such instalments. That the amount of fines for the non-payment of instalments shall, for every share, be in the same ratio as such instalments shall bear to the monthly subscriptions, payable upon an entire or original share.

IX. *Mode of advancing Money by Sale of Shares.*—That so often as the funds of the society shall amount to a share or sum of 100*l.* (or by anticipation, that is, before the funds actually amount to that sum, if the directors shall so determine), the share shall be awarded to the highest bidder by premium for the preference (but no member shall be allowed to advance less than five shillings on each bidding), and the purchaser shall have the privilege of taking as many additional shares at the same rate as the directors may award him, not exceeding nine, on giving notice of such an intention to the chairman at the time of sale ; and the directors shall, if they deem it to the advantage of the society, have the power to sell an additional share or shares, quarter, half, or three-quarter share at the same rate of premium as the last purchase, if required. That if two or more members offer the same sum as the highest bidding for a share, and that sum be the minimum price, or reserved bidding, they shall ballot for the share ; and the party then entitled to it shall pay a deposit of one pound on account of his next subscription money, the same to be forfeited if the share be not taken, pursuant to the 12th rule. That such sales shall take place at such time and place as the directors may appoint. That previous to the sale the chairman shall declare the amount which the purchaser will be required to pay for arrears, or back payments of subscriptions, from the commencement of the society. That the biddings shall be taken by ticket, three times successively, and the person ultimately offering the largest price shall be the purchaser. That whenever a member shall purchase a greater number of shares than he shall have previously subscribed for, the sum of one pound shall be forthwith paid on each share to the secretary, as part of the subscription money payable thereupon ; and all other payments shall be made pursuant to Rule VII. ; and, in default thereof, the said sum of one pound per share shall be forfeited, and the directors shall have power to resell such share or shares.

X. *Minimum Price of Shares.*—That the reserved bidding at which the shares shall be put up, shall be fixed at not less than forty pounds for the first year, and, at subsequent sales, at such prices as the directors shall determine from time to time.

XII. *Security for Money advanced on Shares sold.*—That when any member shall have been awarded his or her share or shares, pursuant to Article IX., he or she shall forthwith give notice of the situation of the premises intended to be offered for the security thereof to the secretary, who shall forthwith transmit a copy of the same to the surveyor, together with the surveyor's fee as mentioned

the mortgages were dated the 3d August, 1847, and the 10th December, \*1847, respectively; he subsequently \*1000

in the fourth rule, and the surveyor shall, within seven days after the receipt thereof, examine the premises mentioned in such notice, and make his report in writing to the directors at the next meeting. That when the directors shall be satisfied that the premises so to be offered as aforesaid are a sufficient security to the society, they shall authorize the trustees to pay to such member the sum or sums of money which he or she shall be entitled to receive, on such member executing a mortgage of such premises as the solicitor to the society shall require, and deliver the same, and all other necessary title-deeds relating thereto, to the solicitor to be deposited with the trustees, as a security to the said society, for so much money as shall therein be expressed to be secured, and the trustees shall make such payment accordingly. That if previously to any member being so entitled to his or her share or shares, he or she shall be desirous of ascertaining the amount which the directors shall be willing to advance on certain premises, notice thereof shall be given to the surveyor, with one guinea on account of the fees, and an examination and a report thereon made, as above mentioned; and the directors shall communicate to such member the amount they shall deem proper to be advanced on such premises, at the cost of the applicant. That whenever any property mortgaged to the society shall be subject to any chief or ground rent, the member to whom the property shall belong shall furnish the secretary with a statement containing the amount of the rent, the name and address of the person or persons to whom, and the day or respective days on which, the same shall become due and payable, and shall, from time to time, produce to the secretary an acknowledgment or voucher for the payment thereof before the period prescribed for such payment shall have elapsed; and in case the rent shall not have been duly paid, the directors shall order the amount thereof to be advanced out of the society's funds to the secretary, who shall pay the same accordingly. That should such member neglect to furnish such statement and to produce such acknowledgment or voucher, or, at the next monthly subscription day which shall succeed such advance, to repay the same, he or she shall, for each default, pay a fine of five shillings. That if any member has purchased one or more share or shares for the purpose of building, he shall be at liberty to employ any surveyor or builder to survey or build for him; but in that case the surveyor of the society must first approve of the plans and specifications of the intended buildings, copies of which are to be left with him, so that he can satisfy himself that the plans and specifications are adhered to; and he is to certify how much of and when the share or shares purchased, not exceeding 75l. per cent, may be advanced to such member as the buildings proceed, in sums of not less than 25l. each, except as the balance. He is also to report the amount of insurance to be effected upon the building. That in no case shall any property be deemed a sufficient security for any moneys to be advanced by the society which shall be subject to any previous mortgage, except to this society, or which shall be held for any term of years subject to an annual rack rent. That when any trustee shall become the purchaser of a share, or do any act moving from himself, then all securities and undertakings shall be made to the other trustees.



claimed to be entitled to redeem the premises so mort-  
 \* 1001 gaged upon \* the terms of repaying the amounts advanced

That should any member, after receiving any portion of his or her share or shares, leave the building upon which the same shall have been advanced unfinished, to the prejudice or risk of the society, the directors (having first given fourteen days' notice to the member of such their intention) shall be at liberty either to sell such premises, or to employ any person or persons to finish and complete the same at the costs and charges of the member, and to advance and pay the sum or sums of money requisite for such purpose accordingly. That in the said mortgage-deed, it shall be specified that in case the said member shall at any time thereafter fail, neglect, or refuse for six calendar months to pay, observe, and perform, all or any of his or her subscriptions, payments, and regulations, on his or her part respectively to be paid, observed, and performed, then the trustees, or directors for the time being may appoint a person or persons to collect the rents and profits of the premises therein mentioned: but should the same be insufficient to satisfy the purpose aforesaid, then the trustees, or the directors in their names, may, without the concurrence or consent of the said member, absolutely sell and dispose of all or any part of the said premises by public auction, but in case no public sale can be effected, then by private contract, for the most money that can be had or gotten for the same, and shall receive the purchase-money arising therefrom; and at such public sale the trustees or directors, or one of them, or some other person to be appointed by him or them, in writing, shall be allowed to buy in the premises on behalf of the society, and to resell the same without being answerable for any loss that may be occasioned by such resale; and out of the money to arise from such collection of rents and profits, or such sale as aforesaid, the directors for the time being shall in the first place discharge all costs, charges, and expenses, which may be incurred on account of such collection of rents, or sale or sales, or in any wise relating to the trusts therein contained; and in the next place shall retain and reimburse themselves, and the said society, all such subscriptions and other payments as shall then be due, owing, and payable by such member, under and by virtue of these rules and the mortgage-deed, and the moneys so retained for the said society shall immediately be placed with the society's bankers to the account of the trustees, for the use and benefit of the society, and they shall and will pay the surplus (if any) arising from such sale or collection of rents to the said member, or to such other person or persons as he or she shall, by writing under his or her hand, direct or appoint to receive the same: and in the said mortgage-deed it shall, amongst other things, be declared that the receipt or receipts of the trustees, or any one or more of them for the time being, acting under that deed, shall be a sufficient discharge and discharges to all tenants and purchasers paying any money to such trustees, without being accountable for the misapplication or non-application thereof, and that the purchaser or purchasers shall not be required, or under the necessity of inquiring into the propriety of such sale or sales, nor whether any such default or deficiency shall have taken place. That the costs of and attending the investigation of the title to property offered to the society shall be paid by the member offering the same, whether

to him by the society, less the amount of subscriptions which he \*had paid, and the proportion of profits in the \*1002

such security be ultimately accepted or not, and shall be recoverable as a debt due to the society, and the member shall make such deposit on account of the said costs as the directors may think fit.

XIII. *Directors may add to Surplus Money Part of Profits.* — That when any sales shall take place of any property mortgaged to this society, the directors shall have power and authority to add to any surplus moneys remaining in the hands of the trustees after satisfaction of the several purposes above mentioned, a proportion of the profits of the society made up to the time of such sale or sales, equal to that which shall at the time be allowed to members withdrawing; and the directors may order the trustees to pay the same to the member, with, and in addition to, the surplus moneys to which he shall be entitled.

XIV. *Power to sell, exchange, or redeem Property in Mortgage.* — That if any member of this society, having purchased any share or shares, and secured the repayment thereof upon his or her premises, shall sell such premises, it shall be lawful for the purchaser to take the same, chargeable with the debt due to the society, and thenceforth to become answerable to the society for the payments of the subscriptions and other charges, as the same shall become payable, on such purchaser signing such agreement as the solicitor to the society may require, for paying the subscription money and other payments to be made by him. That if any member shall be desirous of having his or her property discharged from such debt, it shall be lawful for the holder of such share or shares, or so much thereof as shall be then unpaid, to transfer the same to some other premises of adequate value, to be approved of by the surveyor of the society, and upon having such share or shares, or so much thereof as shall be then due in respect thereof, secured on other premises to the satisfaction of the solicitor, the trustees for the time being shall, at the cost of the member, release and convey the premises for which other premises shall have been substituted, and make such indorsement as hereafter mentioned; and in the first-mentioned event shall also, but at the cost of such member, release him or her from all future liability in respect of the premises upon the shares purchased from the said society, and secured upon the premises sold as before mentioned. That if any member of this society, who shall have received his or her share or shares, or any portion of them shall be desirous of paying and satisfying the security or securities which shall have been given for the same, and shall give notice of such his or her desire to the directors, the directors shall within one month thereafter, award to such member the same proportion of profits per share, as is allowed on the withdrawal of unpurchased shares; and the directors shall make a deduction of such profits and of the amount of subscriptions paid in by such member, from the full amount expressed to be secured in and by the mortgage; and the directors are hereby authorized and empowered to receive the balance in one payment, or by such instalments as the directors and member shall agree upon; and on the payment of the balance, together with all fines and other sums due in respect of such shares, the directors shall desire the trustees to deliver up all deeds and other documents in their custody relating to the security of the mem-

society to which he was entitled. The trustees of the \* 1003 society, \* however, disputed his right to redeem on these ber on such property, and at his or her cost to indorse a receipt or acknowledgment on such mortgage, according to 6 & 7 Will. 4, c. 32, § 5.

XVI. *Members withdrawing.*—That any person who shall be desirous of withdrawing from this society any share or shares which shall not have been purchased according to Rule VIII., shall be allowed to do so on giving one month's notice, in writing, of his or her intention to the directors, at any general meeting of the society, and the money subscribed in respect of such share or shares shall be repaid to such member, subject only to the forfeitures next hereafter mentioned; that is to say, if application to withdraw shall be made within the first year from the first meeting thereof, a forfeiture of half a guinea per share; if within the second year of such meeting, a forfeiture of five shillings and sixpence per share; and if the application to withdraw be made within the third or fourth year from the holding of the said first meeting, he shall take out the net amount of the subscriptions paid in, exclusive of entrance fee; that if the application to withdraw any such share or shares shall be made within the fifth, or any subsequent year from the holding of such first meeting, the directors are hereby empowered to allow the member so desirous of withdrawing, out of the profits which the society shall have realized, a bonus for the withdrawal of each share as they shall from time to time appoint. That if more than one member shall give notice to withdraw at one time, they shall be paid in rotation according to the priority of notice. Provided always, that the forfeitures hereby imposed shall not extend to the widows and children of deceased members. That, in case of the withdrawal of shares from the society, subscriptions in arrear, and all fines incurred previously to any such application, shall be deducted from the amount which the member or members shall be entitled to receive.

XXX. *Reference of Disputes to Arbitration.*—That the directors for the time being, or the major part of them, shall determine all disputes which may arise respecting the construction of these rules, or any of the clauses, matters, or things herein contained, and also of any additions, alterations, or amendments, which shall or may hereafter arise between the trustees, officers, or other members of this society, and the decision of the directors, if satisfactory, shall be conclusive; but if not satisfactory, reference shall be made to arbitration, pursuant to 10 Geo. 4, c. 56, § 27; and at the first meeting of this society, after the enrolment of these rules, five arbitrators shall be elected, none of the said arbitrators being beneficially interested, directly or indirectly, in the funds of this society; and in each case of dispute the names of the arbitrators shall be written on pieces of paper and placed in a box or glass, and the three whose names are first drawn by the complaining party, or some one appointed by him or her, shall be the arbitrators to decide the matter in dispute, whose decision, or that of the major part of them, shall be final.

XXXII. *Arrears at the Close of the Society.*—That when it shall appear by the books of the society that there is sufficient to pay each share of 100l., then all arrears of subscriptions, redemption fines, and other payments, shall be payable immediately; and the trustees shall enforce the payment as before expressed in these rules, and that each member shall be paid his share accordingly.

terms; and in January, 1849, the suit of *Seagrave v. Pope* was \*instituted by T. B. Fleming, jointly with W. Sea- \*1004 grave, to whom he had sold the property, to decide the question \*as to the terms on which the redemption should \*1005 be allowed to take place. The cause came on to be heard \*before the Vice-Chancellor KNIGHT BRUCE, who, on the \*1006 8th March, 1850, made a decree in favour of T. B. Fleming, and from that decree the trustees of the society appealed. The appeal was heard before the Lord Chancellor, Lord TRURO, in December, 1851, and in February, 1852, his Lordship delivered judgment; and, holding that T. B. Fleming was not entitled to redeem except upon the terms of paying all sums which according to the rules of the society were then due or might thereafter become due during the probable duration of the society, his Lordship dismissed the bill. A full report of the proceedings in the suit of *Seagrave v. Pope* will be found in the first volume of De Gex, Macnaghten, and Gordon's Reports, page 788.

In November, 1852, the directors of the society, by their annual report, declared 12*l.* 10*s.* per share to be the amount which they awarded to members who might thereafter withdraw from the society; and on the 7th March, 1853, T. B. Fleming gave notice to the directors that he was desirous of redeeming, and required them to award him the same proportion of profits per share as was allowed on the withdrawal of unpurchased shares.

\* On the 19th December, 1853, T. B. Fleming filed his \*1007 claim against G. Self and others (who had been appointed trustees of the society in the place of R. Pope and others, the

XXXIII. *Termination of the Society.* — That when all the payments hereinbefore mentioned, that is to say, the sum of 100*l.* for each share, with all other expenses and liabilities of the society, shall be fully paid and satisfied, then the accounts shall be finally audited, printed, and sent to each member as hereinbefore mentioned, and the society shall terminate; and the trustees shall, with the advice of the solicitor of the society, deliver up to each member or his legal representatives, the title-deeds and other documents which shall have been deposited with them by such member, as a security to the society, and shall and will at his or her request, indorse on his or her mortgage a receipt for all the moneys intended to be secured thereby, pursuant to 6 & 7 Will. 4, c. 32, § 5. That two-thirds of the majority of the members present at any meeting specially convened for that purpose by giving seven days' notice to each member, shall have full power to declare this society at an end; and all the accounts thereof shall thereupon be finally closed; and such resolution shall be effectual at law and equity as a release to all the members.

former trustees), stating, among other things, the plaintiff's two mortgages; and stating a resolution passed by the directors at a meeting held on the 16th November, 1848, by which it was resolved that the duration of the society could not be expected to terminate at an earlier period than eleven years from its commencement, and that that term of eleven years should be adopted as the basis upon which the directors would make all their future calculations for the purpose of ascertaining the liability of any of their fellow-members who might be desirous of redeeming their property and satisfying the claims of the society as specified in their mortgage-deed; and stating a resolution of the directors, come to on the 2d May, 1853, raising the amount of bonus payable to a withdrawing member to 25*l.* per share, and a subsequent resolution, come to on the 5th September, 1858, further raising it to 82*l.* per share. The plaintiff claimed to be entitled to redeem, and to have allowed to him the same amount of bonus or proportion of profits upon each of his shares as, according to the rules of the society and the resolutions of the directors, was allowed to withdrawing members whose shares had not been purchased or taken up as provided for by the rules; and after deducting the subscriptions and other moneys, if any, which might be payable by him from the amount of the said bonuses or amount of profits, to have the balance paid to him; the plaintiff nevertheless submitting to redeem upon such terms as the Court might think fit to direct. (*a*)

\* The case was heard before the Vice-Chancellor Sir W.

\* 1008 PAGE WOOD in March, 1854, and on the 21st April, 1854, his Honor delivered judgment; he held that the plaintiff could only redeem on paying down at once what would have been payable by him under the rules of the society, calculating by an actuary what would be its probable duration, and made an order accordingly, directing an account to be taken of all subscriptions, redemption moneys, and other payments due and owing and payable, and thereafter to become due and owing and payable, by the plaintiff to the defendants, the trustees, in respect of his shares under and by virtue of the indentures of the 3d August, 1847, and the 10th December, 1847, respectively and the rules and regulations of the society, and in taking the said account the probable duration of the society according to the rules and regulations to be

(*a*) A full statement of the claim will be found in the report of the case before Vice-Chancellor WOOD in the first volume of Mr. Kay's Reports, page 521, &c.

calculated; and all money which (having regard to such probable duration) might at any time thereafter become due from the plaintiff to be considered as due at the time of taking the said account; and referring it to the proper taxing master to tax the defendants their costs in the suit; and ordering the plaintiff to pay to the defendants what should be certified to be due to them for such subscriptions, redemption moneys, and other payments and costs within six months after the chief clerk should have made his certificate at such time and place as should be thereby appointed; and thereupon ordering the defendants to indorse a receipt or acknowledgment of payment on the mortgage-deeds pursuant to the Act of Parliament and according to the rules and regulations of the society, and to deliver up all deeds relating to the mortgaged premises; but in default of the plaintiff paying to the defendants what should be reported to be due to them for such subscriptions, redemption moneys, and other payments \* and costs, ordering the plaintiff's claim to be ab- \* 1009  
solutely dismissed as against the defendants with costs.

The plaintiff then gave notice of motion before the Court of Appeal that the order of the Vice-Chancellor might be varied; and that it might be declared that he, the plaintiff, was entitled to have allowed him the same amount of bonus or portion of profits upon each of his fifteen shares as according to the rules of the society and the resolutions of the directors was allowed to withdrawing members whose shares had not been purchased or taken up as provided for by the rules; and that the total amount of such bonus or proportion of profits might be ascertained; and that it might be declared that the duration of the society for the term of eleven years from the commencement thereof ought to be taken and adopted as the basis upon which the account by the order directed to be taken should proceed; and that, after deducting the subscription and other moneys, if any, which might be payable by him from the amount of the said bonuses or profits, the balance thereof might be paid to the plaintiff, or that the plaintiff might be allowed to redeem the mortgaged property in the claim mentioned upon such other terms and in such manner as their Lordships should think fit to direct. (a)

(a) The appeal was set down to be heard before the Lords Justices and was in the first instance heard before their Lordships on the 6th and 9th June, 1854:

*Mr. Daniel* and *Mr. Hardy*, for the plaintiff, were proceeding to open the appeal.

*Mr. Rolt* and *Mr. T. H. Terrell*, for the defendants, the \* 1010 trustees of the society, took the same preliminary \* objection that had been raised before the Vice-Chancellor; namely, that the question in dispute ought to have been submitted to arbitration, being a question simply of construction of the society's rules, and that consequently the Court had no power to deal with the matter. The thirteenth rule of the society, taken in connection with the twenty-seventh and twenty-eighth sections of the Act 10 Geo. 4, c. 56, as extended by the fourth section of the Act 6 & 7 Will. 4, c. 32, to societies established under that statute, showed that this Court was not the proper tribunal. [They referred to *Crisp v. Bunbury* (a) and *Ex parte Payne*; (b) and they distinguished the present case from *Morrison v. Glover* (c) and from *Cutbill v. Kingdom*. (d)]

*Mr. Daniel* and *Mr. Hardy*, for the plaintiff, submitted that the point in dispute clearly involved matter not within the scope of the rules: the plaintiff was suing as mortgagor, and not as a member. They relied on *Morrison v. Glover*. (c)

The Lord Chancellor expressed his opinion to be, that the Court clearly had jurisdiction: the question at issue was partly on a collateral matter, and did not arise entirely out of the society's rules. Although, therefore, he would not finally decide the point on the present occasion, he should allow the argument on the merits to proceed.

*Mr. Daniel* and *Mr. Hardy* then proceeded with their argument. — The plaintiff did not seek to disturb any thing done in *Seagrave v. Pope*; <sup>1</sup> by becoming a mortgaging member he \* 1011 had not ceased to have an interest in the profits of \* the society, and he claimed in respect of these to be in the same position as a withdrawing member. It had been assumed it was however subsequently, at the desire of their Lordships, reheard before the Lord Chancellor.

(a) 8 Bing. 394.

(c) 4 Exch. 430.

(b) 5 Dowl. & L. 679.

(d) 1 Exch. 494.

<sup>1</sup> 1 De G., M. & G. 783.

that a member in the position of the plaintiff received his 100*l.* share at a discount, but this assumption was not sound: what he received was a sum of money on account of his share, which then went to the society, but this did not deprive him of his right to participate in future profits. It was a most improbable thing that so hard a bargain as that imposed on the plaintiff by the principle worked out in the decree of the Vice-Chancellor should ever have been contemplated, for according to it the plaintiff might have to make payments for an indefinite time without getting any good for them. They referred to the eighth, ninth, twelfth, thirteenth, fourteenth, thirty-second, and thirty-third rules. The Vice-Chancellor had followed what was done in *Mosley v. Baker*, (a) affirmed on appeal by Lord COTTENHAM, (b) but that case did not apply to the present, for there the society had not continued long enough to entitle the plaintiff to any profits, and there was moreover in the mortgage-deed an express provision for calculating the probable duration of the society.

*Mr. Rolt* (with whom was *Mr. T. H. Terrell*), for the defendants, submitted that it was impossible to adopt the plaintiff's view of his own position, consistently with the decisions in *Seagrave v. Pope* and *Mosley v. Baker*. Looking at the natural course of proceeding in these societies, it would be found to give rise to three classes of members: namely, first, investing or continuing members; secondly, mortgaging members, who sold their shares, but continued liable to make payments; and, thirdly, withdrawing members, who took out their \* shares and did not \* 1012 continue liable. Then, considering the meaning of the terms used in the rules, it would be found that "profit" really meant the acceleration of the time when the society would terminate, that is, when each member would receive his 100*l.*, and in this point of view the rules as to withdrawing members would benefit the mortgaging as well as the continuing members: so, in the case of the sale of shares by auction mentioned in the ninth rule, there was nothing surprising in finding the term "purchase-money" used in reference to that dealing, for by those words was meant the 100*l.* minus a discount: the term "bonus" likewise had relation to the duration of the society, and meant so much as

(a) 6 Hare, 87.

(b) 1 Hall & Twells, 301; and see note of the case at the end of this report.



could be given to relieve members in respect of their payments: what was designated "interest or redemption money" was not, properly speaking, either one or the other, but it was an additional, increasing, monthly payment which those members who took out their shares were to pay. Reading the seventh, eighth, ninth, and twelfth rules by this glossary, they became intelligible, and the plaintiff was clearly wrong in treating the sum paid to him as any thing else than a payment in advance of what he would otherwise have been entitled to at the end of the society. Members withdrawing were, under the rules, to be forgiven all after payments, but mortgaging members were not. The decree of the Vice-Chancellor was right. He referred also to the thirteenth and sixteenth rules.

*Mr. Hardy* replied.

November 21.

THE LORD CHANCELLOR. — The question in this case is as to the terms on which the plaintiff is entitled to redeem certain property mortgaged to the defendants. The defendants are trus-

\* 1013 tees \* of the Camberwell Building Society; the plaintiff is a member.

Building societies exist under the provisions of the Act 6 & 7 Will. 4, c. 32, sections 1, 3, 4, 5; the principle is this: members subscribe monthly sums which are accumulated till the fund is sufficient to give a stipulated sum to each member, and then the whole is divided amongst them; in the society now in question the sum to be raised for each member is 100*l*. If this were all, it would be a very simple transaction, mere accumulation, and the only question would be how to invest the sums subscribed to the greatest advantage. But this is not all; one main object is to enable members to obtain their 100*l*. by anticipation on their allowing a large discount. For this purpose, when a sufficient fund is in the hands of the treasurer, the members who desire to get their shares in advance bid, by a sort of auction, the sum which they are ready to allow as discount, and the highest bidder obtains the advance. Thus if at the end of a year a sum of 500*l*. is in the hands of the treasurer arising from the monthly subscriptions, and the holder of ten shares is willing to allow a discount of fifty per cent (no one offering more), the 500*l*. is or may be advanced to him, being 50*l*. in satisfaction of each of his ten

shares. For this accommodation he is bound to pay monthly, till a fund is raised sufficient to give 100*l.* per share to all the other members, not only the original monthly subscription, but also a further monthly sum called redemption money. The statute provides that the shares shall not in any society exceed 150*l.* each: in this society the shares are fixed by the rules, as I have already stated, at 100*l.* each. The amount of the monthly subscriptions and redemption money is fixed by the rules of each society; here the monthly subscription on each share is 8*s.* 6*d.*, the monthly redemption money 3*s.* 6*d.*; so that \* the monthly \* 1014 payment by each member who has not received his share in advance is 8*s.* 6*d.*, by those who have been advanced it is 12*s.* If, after such an advance as I have supposed, no further advance were made, the natural course of the society would be that the members, other than the holder of the ten shares, would continue their monthly subscriptions, and the owner of the ten shares would continue his monthly subscriptions and redemption money, till the fund thus raised should be sufficient to pay 100*l.* per share to every member other than the holder of the ten satisfied shares. Thus if there were one hundred shares, and at the end of the first year there was 500*l.* in hand, the condition of each shareholder before any advance made would be, that he would be bound to pay 8*s.* 6*d.* per month, say 5*l.* per annum, till by means of these payments and the 500*l.* in hand, the requisite amount, that is, 10,000*l.*, being 100*l.* for each 100*l.* share, should have been raised by accumulation. After the advance, the condition of every shareholder, other than the holder of the ten advanced shares, is, that he is to contribute his monthly payments till they, together with the monthly payments and redemption money contributed by the holder of the advanced shares, are sufficient to realize, not 10,000*l.* but 9000*l.*, that is 100*l.* for each share other than the ten shares of the advanced member whose shares will have been already satisfied by the 500*l.* He loses his interest in the 500*l.* advanced to the holder of the ten shares, but on the other hand the sum to be raised is only 9000*l.* instead of 10,000*l.*, and the monthly contribution is increased by the amount of the redemption money paid by the member who has received his ten shares in advance. Further advances are made from time to time as funds are accumulated, and as members are inclined to give high discount in order to obtain payment of their shares by anticipation. The gain to

\*1015 the society arises mainly from the high rate \* of discount which members in want of money are ready to give; in truth, the whole scheme is but an elaborate contrivance for enabling persons having sums for which they have no immediate want to lend them to others at a very high rate of interest. In order to secure the due payment of the monthly subscriptions and redemption money by the members who have received their shares in advance, they are obliged to give satisfactory real security to the trustees of the society, and the statute protects such mortgages from the operation of the laws which until last session were in force against usury.

Besides this advance to a member of his share deducting discount, the rules provide also for the case of a member desiring to withdraw from the society altogether. By the sixteenth rule any member may withdraw on certain terms there laid down, the principle being that he is to pay a small sum by way of fine or penalty if he withdraws at an early date after the formation of the society; but if he withdraws after having been a member, and so having paid his subscriptions, for several years, then on withdrawing he is to receive back the full amount of his subscriptions, and also, if the directors think fit, a further sum, to be from time to time fixed by them, by way of bonus out of what are called the profits of the society; this is provided for by the sixteenth rule, which is thus: [His Lordship here read the rule as above set out.]

It is obvious that this is an arrangement which may, if the calculations be properly made, be carried into effect without injury to the society. When a member withdraws, the society thenceforth loses the benefit of his monthly subscriptions, but then they are relieved from the obligation of making up the 100*l.* to which he would eventually become entitled; if the member on

\*1016 \*withdrawing merely took back the amount of his subscriptions, the society would obviously benefit to the extent of the interest made by means of those subscriptions previously to the withdrawal. It is obvious that out of the interest so realized an allowance may be made to the withdrawing member, still leaving to the society some benefit from his past contributions. The sums subscribed by a member who withdraws have contributed to make up the fund out of which the shares of those members who have been advanced, that is, have taken a smaller sum at once allowing a large discount in lieu of the full sum of 100*l.* at

a distant day, have been made good : they have, therefore, enabled the society to obtain a larger monthly payment, that is, 12*s.* instead of 8*s.* 6*d.*, on each share, and to reduce on favourable terms the number of shares to be eventually provided for : this is in truth substantially an investment at a high rate of interest, and the benefits thereby accruing may not inaptly be designated, together with the interest on ordinary investments, by the name of profit. What is the precise amount of benefit which, from these different causes, may have resulted to the society from the subscriptions of each member, must be a problem very difficult to solve, not perhaps admitting of any absolutely accurate solution ; but it may be possible to arrive at it in a rough way, so at least as to enable the directors to fix from time to time a sum which may, without detriment to the interests of the society, be paid to any member desirous of withdrawing beyond the amount of the principal sums subscribed by him ; and the sixteenth rule enables the directors to fix on such a sum, it being not, I think, inaccurately described as a bonus out of the profits of the society. The interests of members as well those taking their shares by anticipation as those quitting the society, are thus tolerably well provided for.

\* But another case was contemplated ; namely, that of \* 1017 members who, having received their shares by anticipation, might be desirous of relieving themselves from the burden of continuing the payment of their monthly subscriptions and redemption money. From the very nature of these societies it is impossible to know with certainty how long it may be necessary to continue the monthly payments : they must be made until the sum necessary to give to every unadvanced member the full amount of his share, that is, in this society, 100*l.*, has been accumulated : the time required for this purpose will be more or less, according to the amount of benefit which the society may derive from the discount given on advances of shares and from the interest made by investments ; in other words, as the profits realized have been large or small. Reasoning *a priori*, the fair course would seem to be, that the society should ascertain as nearly as may be the period of time during which the monthly payments would have to be continued, and then should allow any advanced member to relieve himself from the obligation of continuing his monthly payments on paying down at once a sum equivalent to their present value. Thus, if the monthly payment is 12*s.*, and it is ascertained that these

payments must probably continue to be made for ten years, it would seem to be a reasonable arrangement that the advanced member, who is liable to pay 12s. per month for ten years, should be freed from his liability on paying down at once a sum which an actuary should say is equivalent in present money to such continued prospective payment. This, however, is not the principle on which the power of redemption is given in this society: the provision on this subject is to be found in the fourteenth rule; it is as follows: [His

Lordship here read the rule as above set out.]

\* 1018 \* It is impossible to read this rule without being strongly impressed with the belief that those who framed it had not duly considered how it would operate. When an unadvanced member withdraws from the society, it is reasonable, and not necessarily inconsistent with the interest of its remaining members, that he should receive back, not only the principal sums which he has contributed, but also by way of bonus a portion of the benefits which those sums have gained for the society. Up to the time of his withdrawing he has received nothing: when he withdraws he loses all right to the share, that is, the 100*l.*, to which, if he had not withdrawn, he would, like every continuing member, have been eventually entitled, and is content to take in lieu of it the amount of what for a series of years he has been paying, together with a portion of what has been, as it were, accumulating in respect of those payments towards the eventual realization of his 100*l.* share. This is the position in which a withdrawing member stands at the time of his withdrawal, but the condition of an advanced member redeeming, which is in truth withdrawing, is very different; he is not a member who has up to the time of his redeeming received nothing; in fact, he has received that which he was content to take, supposing redemption to be out of the question, as an equivalent for the whole of his share. The rule, therefore, which gives to him, on redeeming his obligations, the same sum under the name of profits as is given to the non-advanced member on withdrawing, appears to be hardly reasonable; still, the question to be decided is, not whether the provision is fair and just, but what is the meaning of the rule: if the meaning is clear, it is the duty of the Court if possible to give it effect.

Having thus considered the principle on which building societies in general, and the Camberwell Society in \* particular, are constituted, I will now state the facts which

give rise to the present claim. The plaintiff, being the holder of fifteen shares in the society, and so being entitled to receive at its termination fifteen sums of 100*l.* each, in the month of August, 1847, received five of his shares or an equivalent for them in advance, and on the 10th December following, he, in like manner, received in advance the equivalent for his remaining ten shares. The sum which he got in August in respect of his five shares was 272*l.* 10*s.*, and that which he got in December in respect of his ten shares was 544*l.* In order to secure the payment of his future subscriptions and redemption money, the plaintiff, on occasion of each advance, executed to the trustees of the society a mortgage of certain leasehold property which was considered by the surveyor a sufficient security: this was done in pursuance of the twelfth rule of the society, which is as follows: [His Lordship here read the rule as above set out.] Both mortgages are in the same form; that of the 10th December, 1847, as far as it is material to state it, is to this effect: [His Lordship here stated the general purport of the deed.] (a)

(a) The following abstract of the mortgage-deed of the 10th December, 1847, is taken from 1 De G., M. & G. page 793: By indenture, dated the 10th December, 1847, and made between T. B. Fleming of the one part, and the then trustees of the society of the other part, after reciting the leases intended as a security and the formation of the society, and after reciting that the sum of money to be contributed in respect of each share in the funds of the society amounted to 100*l.*, and that T. B. Fleming was entitled to receive out of the funds 1000*l.* in respect of ten shares as described and numbered in the books of the society, and that for the security of all payments to become due in respect of the said shares he had agreed to execute the assurance thereby made: it was witnessed that T. B. Fleming, in consideration of 544*l.* to him paid by the trustees, assigned to them the leasehold premises in Manor Road therein described, to hold to them, their executors, administrators, or assigns for the residue of the terms by the leases granted, upon trust from time to time so long as T. B. Fleming, his executors, administrators, or assigns should duly make the several payments and observe and perform the regulations prescribed in the articles of the society in respect of the said shares, and also perform all the covenants therein contained to be made, observed, and performed, to permit him or them to hold the said premises and receive the rents thereof for his and their benefit, but if he or they should at any time thereafter fail to perform and keep all or any of the said covenants, or should neglect or refuse, for the space of six calendar months, to pay, observe, and perform all or any of the subscriptions, payments, or redemption money and regulations on his or their parts to be paid, observed, and performed, then upon trust to appoint a person to collect the rents; but should the rents be insufficient to satisfy the purposes aforesaid, then upon trust

\* 1020 \* The claim of the plaintiff, filed on the 19th December, 1853, states these two mortgages, and then states a

\* 1021 \* resolution passed by the directors at one of their meetings duly held on the 16th November, 1848. [His Lordship here read the resolution as above set out.] The society appears by its rules to have commenced on the 6th November, 1843, so that the eleven years referred to in that resolution would end on the 6th November, 1854. The claim then proceeds to state that the directors, by their annual report issued in November, 1852, awarded 12*l.* 10*s.* per share to each member withdrawing ; this was done in pursuance of the sixteenth rule, to which I have already referred. On the 7th March, 1853, the plaintiff gave notice to the directors that he was desirous of redeeming, paying, and satisfying the two securities which he had given in August and December, 1847 : this notice was given under the fourteenth rule of the society, which is as follows : [His Lordship here read the rule as above set out.] On the 2d May, 1853, the directors, by a resolution, raised the amount of bonus payable to a withdrawing member to 25*l.* per share ; and at a subsequent meeting, held on the 5th September, 1853, they further raised it to 32*l.* per share. The plaintiff by his claim, stating these facts, prays to be at liberty to redeem on the terms of being allowed the same amount of profits as, according to the resolutions of the directors, is payable to to sell as therein mentioned, and out of the rents and the money arising from the sale first to retain certain costs as therein mentioned, and in the next place to retain all such principal money, subscriptions, or other payments as should have been advanced to or should be due by T. B. Fleming, his executors, administrators, and assigns in respect of the said shares, it being agreed by the parties thereto that in case such sale should take place, all moneys which would at any time afterwards become due from him or them according to the rules of the society should be considered as then immediately due, and the same or so much thereof as might be lawfully demanded should be deducted out of the moneys received under the aforesaid powers, and to pay the residue of the said moneys unto the said T. B. Fleming, his executors, administrators, or assigns : and it was thereby declared that the deed should not be a security for a greater sum than 544*l.* The indenture contained covenants by T. B. Fleming to complete the message, to pay the subscriptions and interest payable on his shares according to the rules of the society on the days and in manner therein mentioned, and abide by and perform the rules thereof in respect of the said shares ; that it should be lawful for the trustees, &c., after default should be made in the several subscriptions, interest, or other payments thereinbefore made payable, or in observing the rules of the said society, to enter into the said premises and receive the rents ; for further assurance, and to insure from damage by fire.

members withdrawing. The material facts were verified by affidavit; and the case was heard by Vice-Chancellor Wood early in the present year. That very learned and able Judge came to the conclusion that the plaintiff was wrong in setting up any claim to a share of profits, and that he could only redeem on paying down at once what would become payable by him under the society's rules, calculating by an actuary what would be its probable duration. [His Lordship here stated the Vice-Chancellor's order in the terms above set out.] From \* that order the \* 1022 plaintiff appealed to me, and I heard the appeal argued at considerable length shortly before the long vacation.

Vice-Chancellor Wood, who gave to the consideration of this case the greatest attention, came to the conclusion, that it could not have been intended to give any thing on account of profits to an advanced member redeeming his mortgage; and he points out what extraordinary, and even absurd, results must, or may, follow from adopting the plaintiff's construction of the rules. At the time of the argument I was strongly inclined to take the same view of the case as had been taken below; but I have, since that time, had frequent opportunities of considering the subject, and I have, after much reflection, come to the conclusion that, whatever doubt I may entertain as to whether the framers of the fourteenth rule fully understood its operation, still the rule itself is unambiguous: it states expressly that the member redeeming is to be entitled to deduct from the sum secured by the mortgage the same proportion of profits as is allowed to a withdrawing member. Taking my duty to be merely that of construing this rule, it appears to me that the rule itself admits of no doubt; and I may add, further, that to hold an advanced member in this society not entitled to this deduction might work injustice. Who can say how far the existence of this rule may have influenced an advanced member in the amount he agreed to give as a consideration for the advance? It is plain that a member might, without imprudence, give a much larger discount for his 100*l.*, when he knew he had this rule to fall back upon, than if no such rule existed. For instance, suppose there were no such rule, and that a member at the end of the first year were desirous of taking his share in advance,—\* the tenth rule stipulates that at least forty \* 1023 per cent must be given for the advance of a share at the end of the first year,—the member would, therefore, have to con-



sider whether it would be prudent for him to offer a discount of at least forty per cent; if he did so he would receive 60*l.*, having paid during the first year 5*l.*, so that in truth he might be considered as getting an advance of 55*l.*; for that he would have to pay during the continuance of the society, say for ten years longer, a monthly sum of 12*s.*, that is, an annual sum of 7*l.* 4*s.* He might not think it prudent to make such an offer, if the provision of the fourteenth rule did not exist; but with that provision, knowing that he could at any time put himself in the condition of an unadvanced withdrawing member, he might well offer forty, or even fifty, sixty, or seventy per cent for the advance of 100*l.*

The case may be considered: first, as it would have stood if it rested on the mortgages only; secondly, as it is affected by the rules. First, then, let us consider the object and effect of the mortgages. [His Lordship here again referred to the terms of the mortgage-deeds.] The property comprised in the mortgage is thus pledged to the society as a security for the due payment by the plaintiff of all sums of money which under the rules he, as owner of ten shares, may become liable to pay, and upon default the mortgagees, who are trustees for the society, may enter on the mortgaged property, and receive the rents, and, if the rents prove insufficient to satisfy what the plaintiff is bound to pay, may, after a certain lapse of time and notice, sell and retain out of the proceeds all sums which would at any time afterwards become due from the plaintiff by virtue of the rules, treating such sums as all then immediately payable, and having thus satisfied them-

\* 1024 selves the full amount \* of their demand, they are to hand over the surplus to the plaintiff. It will be observed that the sum thus secured to the society is of uncertain amount, a monthly payment to endure for an uncertain period, that is, till thereby and by means of other subscriptions and payments a certain number of shares of 100*l.* each shall have been accumulated. Now, generally speaking, a security of this nature is not redeemable. Where a mortgage is made to secure an annuity for the life of another, or to indemnify against contingent charges, or for any other object not capable of immediate pecuniary valuation, redemption is impossible; a security can only be redeemed where the party redeeming is able to do the thing intended to be secured; and where the thing secured is the payment of an annual or a monthly sum during an uncertain period, no one can say how long

the payments may continue, and it is therefore impossible for the party who has given the security to redeem it by an immediate payment of a fixed sum. Here the object of the deed was to secure certain monthly payments by the plaintiff, till by means thereof and of the monthly subscriptions of the other members a certain sum should be raised; if the plaintiff should make default in any of these payments, the trustees to whom the mortgage is made are empowered to receive the rents, and so to satisfy the society what the plaintiff ought to have paid; if the rents should be insufficient for the purpose, then, but not otherwise, the trustees are authorized to sell. The plaintiff, however, does not suggest that the rents are insufficient, and I cannot assume that to be the case, and taking the rents to be sufficient, the plaintiff certainly can have no right under the terms of the deed alone to compel the trustees to sell, and take a present payment in lieu of the continuing security which they would have by receipt of the rents; he cannot deprive the society \* of the continuing right to \* 1025 receive and apply the rents so long as his obligations to the society remain in force.

The question then arises, secondly, How far are the rights of the parties varied by the rules of the society? That the plaintiff is entitled under the fourteenth rule to redeem seems to admit of no doubt. The object of the rule clearly was to give to any member who had taken his share in advance, and so had become liable to certain payments so long as the society should endure, the right to free himself from those liabilities by paying at once a gross sum of money. The question is on what terms he can exercise that right; or, in other words, what is the true construction of this rule, for it is on that rule alone that his right to redeem depends. The plaintiff contends that, in taking the account against him, he is to have credit for the same proportion of the profits per share as the holder of an unadvanced share would have been entitled to on withdrawing, and I confess, with all deference to the opinion of the Vice-Chancellor, who thought differently, I think that the plaintiff is right. That by the taking of the account on this footing great inconveniences, and even absurdities, may follow, cannot be denied; they are forcibly pointed out and insisted on by the Vice-Chancellor in his judgment: still the question is not as to the policy or reasonableness of the rule, but as to its true meaning. Now as a mere question of construction, the rule, I own,

does not seem to me to admit of doubt; the language is quite distinct: the directors are to award the redeeming member the same proportion of profits per share as is allowed on the withdrawal of unpurchased shares. This may perhaps lead to very absurd consequences, and to results which the framers of the rule never contemplated; still the plaintiff has a right to say that this is the contract which he entered into. In offering a high \* 1026 discount for his share, \* he may have been influenced by the advantages which this provision held out to him; and, if so, it is no sufficient answer to him to say that the consequences of the rule were not contemplated by those who framed it. He has a right, when the meaning of the rule is once ascertained, to insist on its being strictly adhered to, and I have already stated that the language used can hardly be said to admit of doubt. I therefore have come to the conclusion, contrary to the view taken by the Vice-Chancellor, that the plaintiff is entitled to credit for the same share of profits as at the time of the notice given by him would under the sixteenth rule have been allowed to a member withdrawing.

But then another not unimportant question arises on the other side of the account. The plaintiff is in my judgment entitled to credit for these profits; but with what sum is he to be charged on the debit side of the account? The Vice-Chancellor by his order directs a calculation to be made as to the probable duration of the society, and charges the plaintiff with the amount of the payments he would have to make during such probable duration; but on what principle is his liability thus restricted? The security which he has given will be in force, if unredeemed, until the society ceases to exist: what right has this Court to compel the holders of the security to accept, in lieu of its benefits, something different from that which they have contracted for? The security gives them rights which will exist as long as the society shall actually endure; the actual duration of the society may extend over a period longer than its probable duration. In making, therefore, the probable duration of the society the measure of the plaintiff's liability, it is clear that the Court will, or at all events may, be giving to the society something different from that which \* 1027 they would have been entitled to under \* their deed. It is clear this cannot be done, unless it is authorized by the terms of rule fourteen, which gives the power of redeeming. Now

the sum with which, according to that rule, the plaintiff is made chargeable, is the full amount expressed to be secured in and by the mortgage; that is to say, all the sums which, according to the rules of the society, the plaintiff would be bound to pay if there were no redemption. How is the amount of these sums to be ascertained? The fourteenth rule, by authorizing the redemption of such a mortgage, clearly contemplated the possibility of ascertaining it; and I can see no other way of doing so, without the risk of dealing unjustly by the mortgagees, except by charging the mortgagor with all the payments he may have to make, assuming the society to endure for the longest period during which, in the nature of things, it can endure. When it is ascertained what number of 100l. shares still remain to be provided for, there can be no insuperable difficulty in making out at what time, assuming no more members to be advanced and none to withdraw, the requisite sum must have been raised by means of any assets actually in the hands of the treasurer, and of the monthly payments to be made by the members. When that period is ascertained it will be easy to calculate what are the payments which, during its subsistence, the plaintiff will be bound to make in respect of his monthly subscriptions and redemption money, and with that sum he must be charged as with a sum presently due from him. Against that, he is, I think, entitled to credit for the same bonus out of profits as would, according to the rules of the society and the resolutions of the directors, be payable to withdrawing members.

I am aware that in the case of *Mosley v. Baker*, (a) \*referred to in the argument, Sir JAMES WIGRAM, on a \*1028 bill to redeem filed by a member who, having been advanced his shares, had given a mortgage to secure payment of his future monthly subscriptions and redemption money, as in this case, decreed a redemption without allowing the plaintiff mortgagor any thing on account of profits, and on the terms of limiting his liability to the payments he would have to make during the probable duration of the society; and the Vice-Chancellor, in the present case, relied on that decision, which was affirmed by Lord COTTENHAM on appeal. If the two cases had been similar, I should probably have felt bound by such an authority; there are, how-

(a) 6 Hare, 87.

ever, several material distinctions. In the first place, as to profits, no question could there arise, for by the sixty-fifth rule of the society then in question, no share of profit was to be allowed to a withdrawing member until after the expiration of four years from the formation of the society; that society was established in September, 1844, and the bill to redeem was filed in May, 1847, so that in no possible view of the case could the plaintiff be entitled to any claim in respect of profits: and, secondly, as to the period during which the plaintiff's liability to contribute was to be treated as enduring, the mortgage expressly stipulated that in case the mortgagees should exercise their power of sale, they should out of the proceeds retain the full amount thereafter to become due from the mortgagor, calculating the probable duration of the association; the mortgagees did exercise their power of sale, and the decree gave to both parties, mortgagor and mortgagees, the precise benefits for which they had bargained. Assuming, therefore, this provision in the mortgage-deed to have been not inconsistent with the rules of the society, as to which I express no opinion, the decree was perfectly right; but, for the reasons to which I have

\*1029 adverted, it does not seem \*to me to govern this case, where profits were payable to withdrawing members, and where the power of sale had not been exercised, nor on its being exercised was there the provision as to calculating the probable duration of the society.

The result, therefore, is, that the order of Vice-Chancellor Wood must be varied, by substituting, for the direction to calculate the probable duration of the society, a direction to ascertain the longest period during which the society may possibly last, having regard to its net assets and to the amount of monthly subscriptions and redemption money still continuing payable and to the number of 100*l.* shares to be provided for, and by declaring that the plaintiff is to be charged with all subscriptions and redemption money which will become due and payable by him, assuming the society to endure for the whole of that period, such money to be treated as a debt presently due from him. There must, then, be a declaration that against that charge the plaintiff is entitled to credit for 12*l.* 10*s.* on each share, being the amount of bonus payable to withdrawing members at the time when the plaintiff gave his notice. The decree of the Vice-Chancellor gave the defendants their costs, adding them to the money secured, and this was a

matter of course in the view which his Honor took of the rights of the parties ; but in altering the decree as I am doing, I necessarily put an end to the mortgagees' right to the costs of the suit, for they have refused to allow redemption at all on the terms to which the plaintiff was, as I think, entitled, of giving him the share of profits which he claimed ; on the other hand, the plaintiff did not offer the terms to which I think the defendants were entitled : the result, therefore, is that nothing must be said about costs. With these variations the decree of Vice-Chancellor Wood will stand as it is.

\* I must not omit to mention what was pressed by the \* 1030 defendant's counsel, namely, that the Court has in this case no jurisdiction, that the question ought to have been decided by arbitration. The argument on this head was put thus : the fourth section of the 6 & 7 Will. 4, c. 32, enacts that all the provisions of the Friendly Society Act, 10 Geo. 4, c. 56, so far as the same might be applicable, should apply to any benefit building society, as if they were there re-enacted ; the twenty-seventh section of the Friendly Society Act, 10 Geo. 4, c. 56, makes provision for settling disputes by arbitration ; the clause is as follows [His Lordship here read the section], and the thirtieth rule of the society has reference to this subject [His Lordship here read the rule as above set out] ; and it was contended against the present claim of Mr. Fleming that he had no right to call the trustees to account by proceeding in this Court, but that his sole remedy was by a reference to arbitration. To this, however, I cannot agree. The question to be decided depends partly on the construction of the rules, and partly on the true meaning of the mortgage-deed, and the mode of giving to it its true effect. Admitting for the sake of argument that this Court would have no jurisdiction in a dispute depending solely on the construction of the rules, there are still points for decision here, arising on the nature and extent of the relief to be given on the mortgages, which this Court alone can determine. The total absence of adequate machinery for enabling arbitrators to enforce any award they might make on the mortgage in a case like the present affords cogent evidence that the dispute is not within their competency ; *Cutbill v. Kingdom*, (a) referred to in the argument, strongly suggests this view of the case.

(a) 1 Exch. 494.

\* 1031 I may further remark that neither Sir \*JAMES WIGRAM nor Lord COTTENHAM, in the case of *Mosley v. Baker*, nor Lord TRURO in the case of *Seagrave v. Pope*, (a) seem to have had any doubt as to their jurisdiction. The point, indeed, was not, so far as I am aware, raised in argument before them ; still I cannot but think that these cases must be treated as authorities on this subject of no inconsiderable weight. It is difficult to suppose that the want of jurisdiction, if there was such a want, should have escaped the observation of Judges and counsel in all these cases. I consider it clear that the Court has jurisdiction, and I have only adverted to the point that it may not be supposed the objection had been forgotten.

December 9.

The case was spoken to on minutes in reference to the direction to ascertain the duration of the society, and as to costs. The following is the substance of the order thereupon made for the purpose of carrying out the judgment of the Lord Chancellor :—

That so much of the order made by Vice-Chancellor Wood, on the 21st April, 1854, as directed that “ in taking the account the probable duration of the society, according to the rules and regulations, is to be calculated, and all money which (having regard to such probable duration) might at any time hereafter become due from the plaintiff is to be considered as due at the time of taking the said account ” be discharged ; and, instead thereof, “ that in the said account the longest period during which the society might at the time when the plaintiff gave his notice possibly last, having regard to its net assets and to the amount of monthly subscriptions and redemption money then continuing payable

\* 1032 \*and to the number of shares in the society then to be provided for, be ascertained ; that the plaintiff be charged with all subscriptions and redemption money which would become due and payable by him assuming the society to endure for the whole of that period, such money to be treated as a debt presently due from him ; and that against that charge the plaintiff be entitled to credit for twelve pounds ten shillings on each share, being the amount of bonus payable to withdrawing members at the time when the plaintiff gave his notice ; that so much more of the said order as ordered it to be referred to the taxing master to tax

(a) 1 De G., M. & G. 783.

the defendants their costs of the suit be varied by limiting the costs of the defendants to be so taxed to the costs of the defendants subsequent to the date of the present order; that in case of the plaintiff redeeming the mortgages of the defendants there should be no order as to costs on either side up to the date of the present order; that in taking the account directed by the order of Vice-Chancellor WOOD, of the 21st April, 1854, and in making the certificate in pursuance thereof, regard be had to the present order; that in all other respects, except so far as might be inconsistent with the present order, the order of Vice-Chancellor WOOD of the 21st April, 1854, be affirmed.

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MOSLEY v. BAKER.

1848. December 11. 1849. January 30. Before the Lord Chancellor Lord COTTENHAM.

Terms on which a member of a building society is entitled to redeem premises mortgaged by him to the society on receiving an advance of money in respect of his shares.

THIS was an appeal from a decision of Vice-Chancellor WIGRAM; a full report of the case, as heard by his Honor, will be found in the sixth volume of Mr. Hare's Reports, page 87. The appeal was argued before the Lord Chancellor Lord COTTENHAM, previously to the commencement of the series of reports by Messrs. Macnaghten and Gordon.

\* *Mr. Rolt* and *Mr. J. V. Prior* were for the plaintiff, the \* 1033 appellants.

*The Solicitor-General* (Sir JOHN ROMILLY) and *Mr. Beavan* were for the trustees of the society.

1849. January 30.

THE LORD CHANCELLOR. (a) — The decree directs a redemption which is not objected to by the defendants. There is not in the

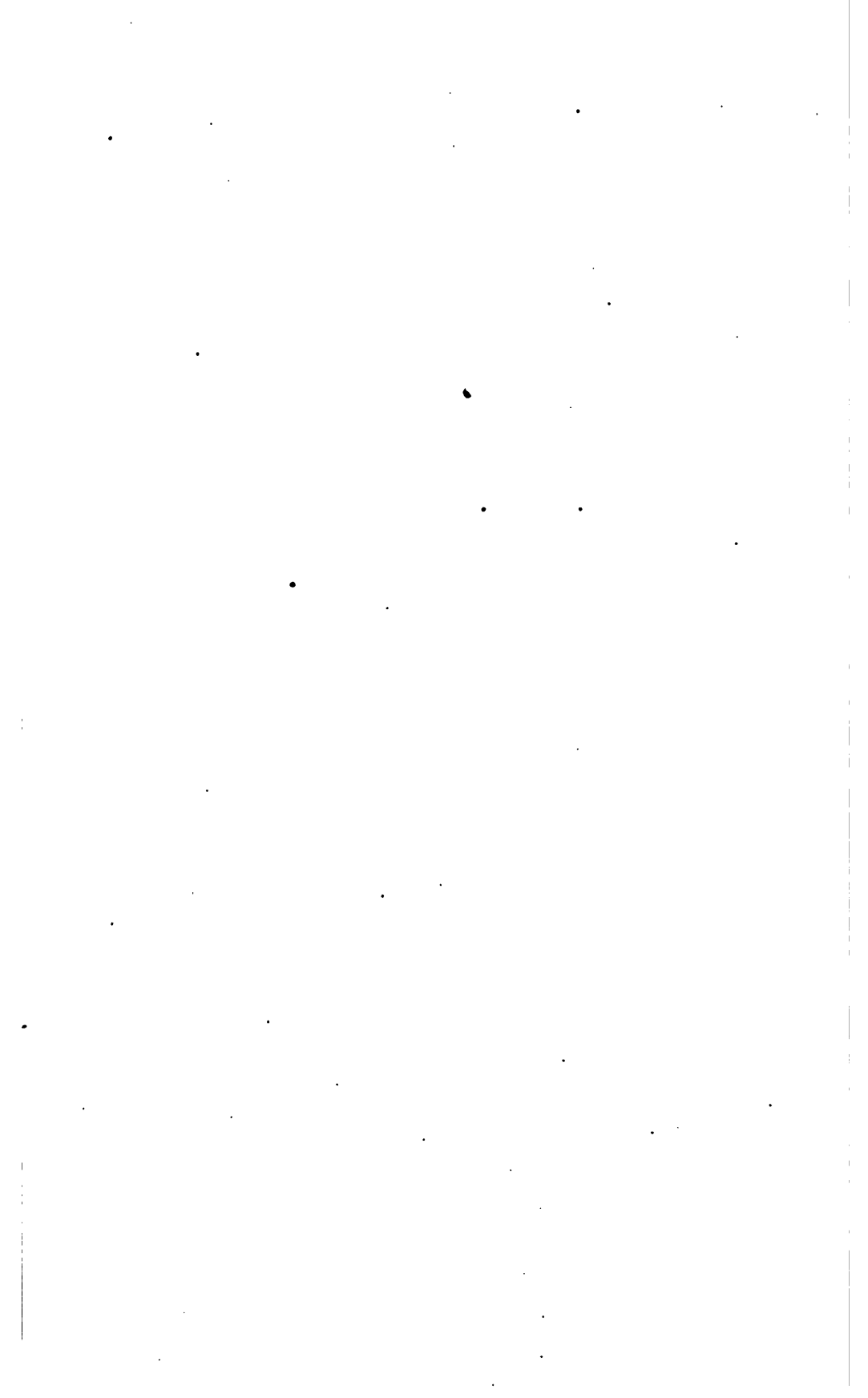
(a) The above is from a copy taken by the present reporter of the written judgment of the Lord Chancellor.



mortgage-deed any provision for a redemption ; the terms, therefore, upon which it ought to take place are to be collected from other parts of the deed, and I have no doubt of the correctness of the Vice-Chancellor WIGRAM's construction of it. The error of the plaintiff seems to arise from a supposition that the mortgage was to secure to the company the sum advanced to him, but such is not the case ; the sum advanced was only in anticipation of the calculated value of his share at the winding up of the affairs of the company, and the mortgage was to secure the payments which the company had stipulated for as the consideration for such shares, and constituting the fund out of which the estimated value of such shares was ultimately to be paid. The recitals and the provisions of the deed are not capable of any other construction ; but that part which is most applicable to the present, the provision for selling the shares, is the most conclusive ; for contemplating the event of the plaintiff not making the stipulated monthly and other payments, it gives to the company a power of selling his shares, the proceeds of which they are to retain in satisfaction of all such subscriptions and other payments as shall be then or shall thereafter become due and owing and payable in respect of such shares, calculating the probable duration of the said association, it being agreed that, in case such sale shall take place, all moneys which shall at any time afterwards become due in respect of the said shares shall be considered as due at the time of such sale, and that the same shall be fully deducted and paid out of the moneys received, and that the amount shall be calculated accordingly. It is obvious that, there not being any stipulated terms for a redemption, the plaintiff cannot be entitled to redeem upon terms less beneficial to the association than those stipulated for in the power reserved to them of selling, and of which they are deprived by the decree for redemption. These, therefore, are the terms

\*1034 binding upon \* the parties, and of their construction there cannot be any doubt. But then it is said that such terms are a departure from the rules and regulations of the association ; to this there are two answers : first, that there is no such departure ; and, secondly, if there were, that the deed alone constitutes the contract between the parties upon which the plaintiff rests his case, not seeking to have it altered or reformed. This excludes the necessity of inquiring into the first objection ; but I cannot but observe that I have not been able to discover any such de-

parture in the deed from the provisions of the rules and regulations as has been suggested. The thirty-seventh rule provides for the monthly payment, and the fifty-ninth for further payment until the objects of the association shall have been fully accomplished, and the power allowing members who have not received the anticipated value of their shares to withdraw excludes from any such power those who have, and who have executed a mortgage. In the forty-eighth rule the security to be given is described as a security for the future payments in respect of such share or shares. The fifty-eighth rule is inaccurate and obscure: it relates to the power of sale to be inserted in the mortgage, and not to redemption; and it provides that upon a sale the association shall retain all such principal subscriptions and other payments as shall be then due, owing, and payable under and by virtue of such rules and mortgage. Now the money advanced is not due or repayable by the party receiving it, but the subscriptions are payable during the continuance of the association, and the security to be taken is to secure such payments: subscriptions "then due" cannot mean subscriptions actually become due in point of time; for, if so, the shareholder, having received the whole estimated value of his shares, would be entitled to have his property restored to him, deducting only such subscriptions the time for paying which had actually arrived. The sixty-second rule, which is directly applicable to the present case, as it relates to the redemption of property in mortgage, is quite conclusive, for it provides that upon redemption the shareholder shall have the amount of his share of profits and subscriptions paid deducted from the full amount expressed to be secured in and by such mortgage; but the forty-eighth rule describes the security to be given as a security for the future payments in respect of such share or shares, and not for the money advanced. I am, therefore, of opinion that the mortgage-deed, if that were involved in this case, does not depart from the rules and regulations, and that the principle of the decree is right, and that the future payments are to be taken at full value, and that the direction as to costs is correct. The appeal must be dismissed with costs.



# AN INDEX

TO

## THE PRINCIPAL MATTERS

CONTAINED IN THIS VOLUME.

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**ACCUMULATION.** See *WILL*, 2.

**ACKNOWLEDGMENT.** See *LIMITATIONS, STATUTE OF*.

**ACQUIESCENCE.** See *LACHES. TRADE-MARKS*.

**ADVANCEMENT.**

Lands bought by a father in the name of his son *held* under the circumstances of the case not to amount to an advancement; but the Lord Chancellor declined to make an order to that effect on the petition of the father, though the petition was founded on the certificate of the Master under the 38th section of the Trustee Act, 1850. — *Collinson v. Collinson*, 409.

**AFFIDAVITS.** See *PRACTICE*, 4.

**AGREEMENT.** See *CONTRACT*.

**ALLOTTEE.** See *WINDING-UP ACTS*, 4.

**AMENDING BILL.** See *PRACTICE*, 7.

**ANNUITY.**

1. The grantor of an annuity, which was the third incumbrance on his real estates, executed a trust-deed (to which the annuitant was not a party) whereby the estates were conveyed to trustees on trusts for sale to discharge the incumbrances according to their priorities; and the first trust of that deed was to pay the costs of the trustees in the conduct of the sale. After the execution of the trust-deed the trustees applied to the annuitant for his consent to the sale. In answer to that application the solicitors \* of the annuitant offered to facilitate the sale, \* 1036 but asked for a copy of the trust-deed, adding: "When we have seen the deed we shall be better able to inform you whether our clients will have any difficulty in joining in the conveyances." And, in answer to a subsequent application, they assented to the appropriation of a part of the rents towards rendering the property more eligible for sale. Part of the property was sold, the annuitant concurring in the sale; whereby a sufficient sum was realized to pay the prior incumbrances; but it being apprehended that the residue of the property

would not realize enough to pay both the costs of the trustees and to redeem the annuity, the trustees applied to the annuitant for leave to retain, in the first place, out of the future proceeds of sale, a sum sufficient to pay their costs. This being refused, and a bill being filed to compel the annuitant to join in the conveyances: *Held*, under the circumstances, that he was not bound to do so, except upon the terms of having the annuity redeemed. — *Crosse v. The General Reversionary and Investment Company*, 698.

2. An annuity duly charged on freeholds was by deed assigned, and by that deed a further security was given by the grantors upon copyholds, in consideration of an additional sum of money paid to the grantors, and the sum payable for redemption was increased in amount. The assignees of the annuity appeared in the memorial to be trustees for other persons, but the trust was not disclosed on the deed of assignment. *Held*, that the deed of assignment, so far as it affected the copyholds and so far as it contained any alteration of the term on which the original annuity was granted, was void, but that it was valid as an assignment of the original annuity. *Bolton v. Williams*, 2 Ves. Jr. 198, observed upon. — *Tidd v. Lister*, 874.

See also BANKRUPTCY, 6. WILL, 9, 10, 19.

APPEAL. See PRACTICE, 2.

ASSETS, ADMINISTRATION OF.

1. Testator being possessed of real and personal estate directed the latter to be invested in government securities, the interest whereof, with all the rents and profits from freehold, copyhold, or leasehold property, after payment of all his debts, &c., he gave and devised upon certain trusts. *Held*, that this did not evidence a sufficient intention to create a mixed fund, so as to exempt the application of the personal estate in the first instance from the discharge of his debts. — *Tidd v. Lister*, 857.
2. Freehold estates over which a testator has a general power of appointment, and which he appoints by his will, are assets for payment  
\* 1037 \* of his simple contract debts, but are only applicable for that purpose after all the testator's own property has been previously so applied. — *Fleming v. Buchanan*, 976.

ASSIGNMENT. See ANNUITY, 2. BANKRUPTCY, 10. DEED, 2.

BANKRUPTCY.

1. Coal proprietors employed colliers, to whom the work was let off at so much per score baskets, and each collier had a drawer attached to him, whom he brought when he was himself hired. The colliers were not hired unless the manager approved the drawers, or unless, in case of disapproval, the colliers took drawers provided for them by the manager. The colliers paid the drawers out of their earnings, according to an agreement between them (in which the coal proprietor took no part), and discharged the drawers as they thought fit, without interference on the part of the proprietor, except that the latter might discharge the collier if he unjustly discharged the drawer, and that both collier and

drawer might be discharged for transgressing the rules of the mine. Upon the proprietor becoming bankrupt, and the colliers' wages being in arrear, *held*, that the drawers were not servants of the coal proprietors so as to be entitled to payment in full of half a year's wages. — *Ex parte Ball*, 155.

2. The obligee in a bond given by a trader recovered judgment upon it after the obligor had ceased trading. *Held*, that the bond debt was not so merged in the judgment as to preclude the obligee from petitioning for adjudication against the obligor. *Held* also, that such a judgment was a good foundation for an act of bankruptcy under the 72d section, having for this purpose relation to the trading, and that the notice under that section was correct, although it required payment of the judgment, and not of the bond. *Held*, further, that a member of Parliament may become bankrupt under the 72d section of the Act.

Where the Court, differing from the commissioner, and holding the petitioning creditor's debt to be sufficient, referred back to him the question of the validity of the adjudication, an application for leave to appeal to the House of Lords from the decision as to the sufficiency of the debt was *held* premature, and was ordered to stand over till the commissioner should have given his decision. — *Ex parte Griffiths*, 174.

3. A petition to annul an adjudication in bankruptcy on the ground of the infancy of the bankrupt, but which was not presented until after the expiration of the time limited for that purpose by the 239d section of the Bankrupt Law Consolidation Act, 1849 (12 & 13 Vict. c. 106), dismissed as out of time, the Lord \* Chancellor holding \* 1038 that the case of an infant was no exception from the provisions of that section. — *In re West*, 198.

4. Messrs. B., ship-owners at South Shields, had dealings with K. & Co., bankers in London: the course of dealing was that Messrs. B. drew bills on K. & Co. which K. & Co. accepted for the accommodation of Messrs. B., and in order to provide for the payment of these acceptances Messrs. B. remitted to K. & Co. cash, and deposited with them bills payable to Messrs. B., and the amount of these bills was received by K. & Co. and placed by them to the credit of Messrs. B.'s cash account. Both firms became bankrupt, K. & Co. in July, 1812, and Messrs. B. in August of the same year: there was then a large balance owing by Messrs. B. to K. & Co. on the cash account, K. & Co. being also liable to a large amount upon bills accepted by them for the accommodation of Messrs. B. and having in their hands bills also to a large amount deposited with them by Messrs. B. to provide for the payment of such acceptances: before any dividend was declared upon the estate of K. & Co. their assignees realized from the deposited bills more than sufficient to liquidate the cash balance due from Messrs. B.: the holders of the accommodation bills proved against both estates and were fully paid, receiving from each estate at different times dividends to the amount of ten shillings in the pound: the sum thus paid in dividends by the estate of K. & Co. exceeded by above 6000*l.* the total sum realized from the deposited bills: no debt was proved or attempted to be proved

class, and suspending it for two years, and withholding protection for six months.

The 256th section, which deals with "offences," is to be strictly rather than loosely construed; and *semble*, that if only one of the offences therein enumerated is committed, it is not imperative on the Court to award the extreme penalty there imposed. — *Ex parte Manico*, 502.

- \* 1041 8. After the senior commissioner of the Court of Bankruptcy had transacted \* all the business before him, and left the court for the day, one of the other commissioners made an order for the transfer of a petition for adjudication from a district Court to London. On the matter being brought before the senior commissioner, he ordered the petition to be retransferred to the district Court, considering that his absence had not been "unavoidable" within the 20th section, and that therefore the other commissioner had no jurisdiction. *Held*, on appeal, first, that the absence of the senior commissioner must be considered to have been unavoidable; secondly, that the senior commissioner had no power to reverse the order for transfer; thirdly, that, as the great majority of the creditors in number and value resided in the London district, the order of transfer was right upon the merits. — *Ex parte Sewell*, 508.

9. Two creditors had entered up judgment against a trader on a warrant of attorney, but had not registered it according to the 1 & 2 Vict. c. 110. They attended a meeting for investigating the affairs of the debtor, and were there informed by a solicitor, who attended on behalf of the general creditors, that he had in his pocket the means of preventing them from obtaining any preference. The solicitor had with him at the time a declaration of insolvency which he had previously obtained from the trader. Having made the above statement, he inquired (as he deposed) of the judgment creditors whether they intended to seek any preference by means of their judgment, and received an answer from them in the negative, but he purposely abstained from mentioning registration. On the investigation taking place, it had appeared that the trader had freehold property of considerable value, and the further investigation was adjourned to an appointed day. The solicitor forbore to file the declaration of insolvency, but the judgment creditors registered their judgment a few days after that of the meeting. On the trader becoming bankrupt some months afterwards:—*Held*, 1. That the judgment creditors had not precluded themselves from registering their judgment, and that the promise made by them (if any) was *nudum pactum*, and one into which they had been drawn, and not a representation acted upon by another party by which they were equally bound. 2. That the general creditors, having allowed so long a time to pass without taking any step to set aside the proceeding, could not resist the priority thereby obtained. 3. That since the passing of the Bankrupt Law Consolidation Act, the law as laid down in *Re Perrin* (2 Drury & Warren, 147) is inapplicable, and that a registered judgment, although entered up on a warrant of attorney, and although not followed by execution, now constitutes a valid lien on the lands of a bankrupt after the lapse of a

year from the time when it was entered up. — *Ex parte Boyle*, 515.

- \* 10. A trader, when insolvent and subject to two judgments, conveyed \* 1042 and assigned to certain creditors real property (incumbered to its full value) certain policies of assurance, and all his credits, together with his books of account (being all his property except his furniture and stock in trade), by way of mortgage, to secure the debt due to the creditors. Executions had been issued on the judgments, and the furniture and stock in trade had been seized under them at the time of the assignment. The trader became bankrupt: *Held*, that the assignment was void as against the assignees under the bankruptcy, although the bankrupt might not have been aware when he executed it that the executions had issued.

Principles on which assignments are void, as preventing the continuance of trade. — *Ex parte Bailey*, 534.

11. A trader who was not engaged in any business, except as the owner of two small sailing vessels, kept no regular accounts. He contracted with a ship-builder for the repair of one of the vessels, and the amount claimed for the repair was far beyond the contract price, by reason of some alterations alleged to be beyond the contract. Cross actions were brought and settled by arbitration. The trader left England in a feeling of irritation at the result of the proceedings, and was declared bankrupt on the petition of the ship-builder. He had on a former occasion compounded with his creditors, paying them less than 15s. in the pound, but had been forced into this proceeding by misfortune: *Held*, that the bankrupt's conduct in quitting England was highly censurable, but would be sufficiently punished by suspending his certificate for twelve months, and allowing it as one of the second class.

Under the present Act the Court will not universally refuse a certificate protecting the bankrupt's property, merely because he has on a former occasion compounded with his creditors, and paid less than 15s. in the pound. — *Ex parte Hodgson*, 547.

BOND. See BANKRUPTCY, 2.

BUILDING SOCIETY.

1. The owner of shares in a benefit building society gave a mortgage security on leaseholds for sums advanced to him by the society in respect of his shares; he subsequently gave notice of his desire to redeem, and a difference having arisen as to the terms of redemption, he filed a claim. The Lord Chancellor made a decree for redemption, directing a calculation of the longest possible duration of the society at the date of the notice, having regard to the net assets of the society and to the monthly subscriptions and redemption money still continuing payable and to the number of 100l. shares to be provided for, and charging the plaintiff as a present debt with all subscriptions and redemption money which would become payable \* by him assuming the society to \* 1043 endure for the whole of the calculated period, and crediting him with the amount of bonus payable at the date of the notice to withdrawing members.



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- The provisions as to arbitration contained in the 27th section of the Act 10 Geo. 4, c. 56, and which are incorporated into the Act 6 & 7 Will. 4, c. 32, do not apply to questions such as those raised on the above claim, the determination of which depended partly on the construction of the rules of the society and partly on the meaning of the mortgage-deed and the mode of giving effect to it. — *Fleming v. Self*, 997.
2. Terms on which a member of a building society is entitled to redeem premises mortgaged by him to the society on receiving an advance of money in respect of his shares. — *Mosley v. Baker*, 1032.

CALL. See WINDING-UP ACTS, 6.

CERTIFICATE. See BANKRUPTCY, 7, 11.

CHARITY.

1. A petition for the appointment of new trustees of a charity should be entitled, In the Matter of the 52 Geo. 3, c. 101, as well as, In the Matter of the Trustee Act, 1850, and the Attorney-General's fiat should be obtained before the petition is disposed of. — *In re Rolle's Charity*, 153.
2. The Vice-Chancellors have jurisdiction to appoint trustees of charities in the place of the judges of the Courts abolished by the Act for the more effectual Administration of Justice in England and Wales, 11 Geo. 4 & 1 Will. 4, c. 70. — *In re Robinson's Charity*, 188.

CHURCH BUILDING SOCIETY. See MORTMAIN.

COMMISSIONERS TO ADMINISTER OATHS IN CHANCERY. See PRACTICE, 9.

COMPOSITION DEED. See BANKRUPTCY, 5.

CONDITION. See DEED, 5.

CONTEMPT. See TRADE-MARKS, 1.

CONTRACT.

1. Lands were settled to such uses as Sir C. M. and his son should by deed jointly direct, and subject thereto to Sir C. M. and his son successively for life, with remainders over to the sons of the son in tail. A railway company having under their act power to take the lands thus settled, Sir C. M. and his son contracted for the sale to them of a certain part of the lands, and the company were let \* into possession on an agreement that the amount of compensation should be settled either by arbitration or a jury as Sir C. M. should choose; the company also paid a sum of money to Sir C. M. expressly on account of the compensation money to be ultimately fixed; Sir C. M., however, died before any thing further was done: *Held*, under these circumstances, that there was no contract, the specific performance of which the Court could enforce or aid in carrying into effect as a defective execution of the joint power of appointment, at the instance of the son and against the parties entitled in remainder under the settlement.

Where on a sale of property the parties have stipulated that the price shall be ascertained in a particular way, and it is not so ascertained, the Court cannot, in the absence of special circumstances, interfere to aid the carrying out of the contract by having the price ascertained in some different mode.

Whether, where the Court would aid the defective execution of a power against an owner in fee in possession, it would also do so against a remainder-man: and whether, where the assistance of the Court was not requisite to enable the purchaser to obtain the benefit of his contract, the Court would aid the defective execution of a power at the instance of a party deriving benefit from such execution against those whose rights the exercise of the power would defeat. — *Morgan v. Milman*, 24.

2. Where a defendant admits an agreement, if he means to rely on the fact of its not being in writing and signed, and so being invalid by reason of the Statute of Frauds, he must say so; otherwise he must be taken to mean that the admitted agreement was a written agreement, good under the statute, or else that, on some other ground, it is binding on him. But where he denies or does not admit an agreement, he need not plead the Statute of Frauds; the burden of proof is altogether on the plaintiff, who must then produce a valid agreement capable of being enforced.

Specific performance of an agreement to lease refused, when the alleged contract was founded upon expressions in a letter written by the defendant's agent to the intended lessee, to the effect that instructions had been given for the preparation of the lease in conformity with terms arranged, no agreement having been actually signed.

The owner of an estate, in answer to an inquiry from an intending lessee, said, "A. B. manages all my affairs, and you are to treat with him." This does not imply that A. B. had authority to enter into a binding agreement. *Semble*. — *Ridgway v. Wharton*, 677.

See also BANKRUPTCY, 4. PUBLIC COMPANY, 6.

\* CONTRIBUTORY. See WINDING-UP ACTS.

\* 1045

COPYHOLD.

1. A surrender by a husband and wife of the wife's copyhold estate taken out of Court by a deputy steward who was under age and by whom the wife was separately examined, *held* to be valid, the infancy of the deputy steward forming no good ground of objection.

A surrender made as above mentioned was expressed to be to such uses in favour or for the benefit of the husband, his heirs, and assigns, and with such powers of sale, and other powers and provisos, and chargeable with such sums as a mortgagee (to whom a conditional surrender had some time previously been made to secure 50*l*.) should, at the request and by the direction of the husband appoint, and subject thereto to the use of the mortgagee and his heirs, with a proviso for making the surrender void on payment of the sum of 100*l*. then advanced by the mortgagee to the husband: *Held*, that the destination of the equity of redemption was completely changed by the last-mentioned surrender, and was not merely affected to the extent required for the purposes of the security thereby created: *Held*, also, that the lord, having accepted a surrender in the above form, was bound by it. *Semble*, that he could not have been compelled to accept it. — *Eddleston v. Collins*, 1.

2. S. and J. being joint tenants of copyhold lands for life in remainder expectant upon the determination of a previous life-estate in M. with several inheritances in tail, with cross remainders in tail, S. and her hus-

band without the concurrence of M. surrendered their estate and interest to the intent that the lord should regrant the same to such person or persons as the husband should by will appoint; S. died in the lifetime of her husband and of J.; the husband afterwards died, having by his will appointed the surrendered share to his executors: *Held*, that the quasi estate tail of S. was not barred, and that whether the life-estate of M. was under the same instrument as that under which S. and J. derived their title, or whether M.'s tenancy was under her paramount title of free-bench, still her concurrence was necessary in order effectually to bar the estate tail in remainder. *Held*, also, that there was, under the circumstances, no severance of the joint tenancy. Whether the surrender by a joint tenant to the use of his will would *per se* effect a severance of the joint tenancy, *quære*. — *Edwards v. Champion*, 202.

3. The manor of W. was by settlement vested in trustees upon such trusts as E. B., a married woman, should by will appoint; before any will was made, a piece of copyhold land was under an Inclosure Act allotted to the trustees of the settlement as lords of the manor and in compensation of their interest \* in the soil of the manor; under the same Act two copyhold allotments were made to two other persons in respect of copyhold interests: the trustees of the settlement, in exercise of a power vested in them for that purpose, bought the two last-mentioned allotments and held them upon the same trusts as the manor; afterwards, in 1807, E. B. made her will devising the manor with its appurtenances to the father of the plaintiff for life, with remainder to his first son in tail, with remainder to his second son the plaintiff, and devising the residue of her property to trustees on trust to sell; E. B. died in 1813, and the copyhold allotment made to the trustees of the settlement and the two allotments purchased by them were then treated by the trustees of the will as part of the residue, and in 1814 were sold to a person from whom the defendant subsequently purchased. The plaintiff, while an infant, became entitled in 1831 by the deaths of his father and elder brother to the manor under the devise; he attained twenty-one in 1849, and soon afterwards filed a bill claiming the three allotments as part of the manor: *Held*, that, as to each allotment, there had been under the circumstances an extinguishment of the copyhold in the manor, and that they all passed to the plaintiff under the devise of the manor, there being nothing on the face of the will to show that the testatrix intended to use the word in any other than its ordinary legal meaning.

*Held*, also, that the plaintiff was entitled to an account of rents and profits from the time his title accrued in 1831. The rule is that, in the absence of special circumstances, a party found to be wrongfully in possession of property is to account for rents and profits during the whole period of time that his wrongful possession has continued. The authorities on this point referred to and observed upon, and the decision in *Drummond v. The Duke of St. Albans*, 5 Ves. 493, held not to be law. — *Hicks v. Sallitt*, 782.

COVENANT FOR QUIET ENJOYMENT. See VENDOR AND PURCHASER, 2.

DEBTOR AND CREDITOR. See BANKRUPTCY, 4. INJUNCTION.

DECISIONS OBSERVED UPON. See ANNUITY, 2. BANKRUPTCY, 5, 9. COPYHOLD, 3. DEED, 2. WILL, 2, 5, 8. WINDING-UP ACTS, 6.

DECREE TO ESTABLISH WILL. See WILL, 15.

\* DECREE TO EXECUTE TRUSTS OF WILL. See WILL, 6. \* 1047 DEED.

1. A. and his wife, by deed, limited the estate to such uses as A. alone should by deed or will appoint: on the next day, A. by deed-poll appointed to such uses, &c., as he and his wife should jointly appoint, with remainder in default of appointment to the son in fee; and on the day after by a deed A. and his wife appointed the estate by way of mortgage: after this last deed had been engrossed, it was considerably altered and interlined, the wife not having been originally made a party to it: *Held*, under the circumstances, that the three deeds must be presumed to have formed but one transaction. — *Whitbread v. Smith*, 727.
2. Under an assignment to creditors by a debtor of all his stock in trade, book and other debts, goods, securities, chattels, and effects whatsoever, except the wearing apparel of himself and his family: *Held*, that a contingent interest in the residuary estate of a testator (to which the debtor was entitled in the event of his sister dying without a child) passed. *Pope v. Whitcombe*, 3 Russ. 124, observed upon. — *Ivison v. Gassiot*, 958.
3. By a marriage settlement, a moiety of the settled fund was assured in trust after the death of the wife, if she died in the lifetime of the husband, to such uses as she should appoint, and, in default of appointment, to such person or persons as at her decease would have been entitled to the clear residue of her personal estate under the Statute of Distributions, in case she had died intestate without having married. On the death of the wife in the lifetime of the husband without having exercised the power, *held*, that the children of the marriage were entitled. — *In re Norman's Trust*, 965.
4. Upon the marriage of one of several residuary legatees under her father's will, the intended husband and wife assigned to trustees all and every the sum and sums of money, legacy and legacies, and other personal property then due and payable or belonging to, or to become due and payable to the intended wife under or by virtue of her father's will, "or otherwise howsoever," upon trusts for her separate use for her life without power of anticipation, with trusts in remainder in favour of the children of the marriage. By the next witnessing part of the same settlement, it was agreed that in case any real or personal property should during the coverture be given or bequeathed to the wife, the husband should settle it upon trust, so that the wife should have sole power of disposing of the same: *Held*, that a legacy bequeathed by another will to the wife after the marriage was not subject to the  
\* trusts for the children, the latter witnessing part of the settle- \* 1048

ment showing that the former must be read in a restricted sense.—*Ex parte Stephenson*, 969.

5. By an antenuptial settlement the father of the husband conveyed freehold hereditaments to the use of trustees during the life of the wife in trust for her separate use, subject to a proviso whereby it was declared that if a separation should take place by reason of any disagreement between the husband and wife or otherwise the rents and profits should, from the time of such separation during the joint lives of the husband and wife, be paid to the husband: *Held*, that the proviso was in the nature of a condition and not of a limitation, and that it was void as being contrary to public policy.—*Cartwright v. Cartwright*, 982.

See also MORTGAGE, 1.

#### ECCLESIASTICAL COMMISSIONERS.

By the 6 & 7 Will. 4, c. 19, the temporal jurisdiction, including all *jura regalia* of the bishopric of Durham, was transferred from the bishop to the Crown, and by the sixth section of that Act the rights of any persons holding any office by patent were reserved, and the revenues of the see were made chargeable with the same fees and stipends in respect of any office in the county of Durham as the same had theretofore been subject to. Under the authority of the Acts constituting the ecclesiastical commissioners, and by an Order in Council in 1836, the surplus revenues of the see of Durham, after providing for the bishopric, were directed to be paid to the ecclesiastical commissioners, and such surplus was made chargeable with the payment of the fees and stipends granted out of the revenues of the see by the last or any preceding bishop to any officer of the Palatinate who held his office by patent at the time of the passing of the Act 6 & 7 Will. 4, c. 19. The office of Chancellor of the Palatinate was created by patent before the time of Henry VIII.; and the fees in respect of such office were about 27*l*. In the year 1788 the then bishop made a voluntary grant of 100*l*. to the Chancellor, payable out of the revenues of the bishopric, for each sitting of the Chancellor's Court, and from that period down to 1836 100*l*. was entered in the accounts of the bishopric under the headings sometimes "new stipend" and sometimes "new stipend due this sitting." The ecclesiastical commissioners having refused to pay the present Chancellor, who was appointed in 1852, any more than the sum for which there was evidence of a grant by patent; *Held*, that, having regard to the period during which the 100*l*. had been *de facto* paid, and irrespective of \* the question whether the payment of that sum could ever have been enforced by action at law, the surplus revenues of the bishopric in the hands of the ecclesiastical commissioners were liable for the payment of the sum of 100*l*. for each sitting of the Chancellor.—*Temple v. The Ecclesiastical Commissioners*, 418.

EVIDENCE. See PRACTICE, 8, 10.

**FEME COVERT.**

Although the purchaser for value from the husband of his wife's *chose in action*, to the *corpus* of which she is entitled, is in no better position than the husband himself, yet the husband's assignment for value of his wife's equitable life-interest will prevail against her if he afterwards deserts her and leaves her destitute; if he deserts his wife, a Court of Equity will not help him to get at the fund without securing to the wife a portion of the income; but this consideration is inapplicable to the assignee of the husband.

The income of a married woman's life-estate had been ordered to be received and applied by a receiver in the suit, in payment of her husband's incumbrances: *Held*, that arrears of income in the receiver's hands which had not been paid as directed were nevertheless, by the effect of the order, reduced into possession so as to disentitle the wife surviving to such arrears. — *Tidd v. Lister*, 857.

See also PRACTICE, 5, 12. WILL, 18.

**FORECLOSURE.** See PRACTICE, 1, 6.

**FRAUDS, STATUTE OF.**

A father, shortly before the marriage of his daughter, told her intended husband that he meant to give certain leasehold property to the couple on their marriage. After the marriage he gave up possession of the property to the husband, to whom he directed the tenants to pay the rents, and handed to the husband the title-deeds. The husband expended money upon the property: *Held*, sufficient part-performance to take the case out of the Statute of Frauds. — *Surcome v. Piniger*, 571.

See also CONTRACT, 2. PUBLIC COMPANY, 5.

**HUSBAND AND WIFE.** See FEME COVERT. MORTGAGE, 2.

**INFANT.**

Although the Court will under special circumstances allow an infant

\* ward to go out of the jurisdiction, yet it will not compel the \* 1050 removal of an infant ward out of the jurisdiction.

An infant, being a British subject and also an American citizen, and having lost both father and mother, was brought over to England from the United States, where her property was situated, by a paternal aunt with whom she resided; an application was then made by a maternal aunt, who had been appointed her guardian by the Court in America, to have the custody of the infant delivered to her, with the view of taking the infant back to America. The Lord Chancellor refused to interfere, being of opinion that he had no right to make such an order, even if on other grounds he had thought proper, which he did not, to accede to the application. — *Dawson v. Jay*, 764.

See BANKRUPTCY, 3. COPYHOLD, 1.



**INJUNCTION.**

Where a debtor became bankrupt in England, having real estate in Scotland, *held*, that this state of circumstances gave no jurisdiction to the Court of Chancery to restrain a creditor who had not proved under the bankruptcy from proceeding in an action against the assignees in Scotland, for the purpose of recovering out of the real estate there an amount equal to the dividend which would have been payable upon the debt, and the grounds on which the Court of Chancery restrains creditors from proceeding against an executor after a decree for administration do not exist in such a case.

Principles on which a creditor is restrained from proceeding after a decree for administration. — *Pennell v. Roy*, 126.

See also PUBLIC COMPANY, 3, 6. NUISANCE. SOLICITOR. TRADE-MARKS.

**JOINT-STOCK COMPANIES REGISTRATION ACT.** See PUBLIC COMPANY, 2. WINDING-UP ACTS, 6.

**JOINT TENANCY.** See COPYHOLD, 2. WILL, 13.

**JUDGMENT.** See BANKRUPTCY, 2.

**LACHES.** See NUISANCE. PUBLIC COMPANY, 1. TRADE-MARKS.

**LANDS CLAUSES CONSOLIDATION ACT, 1845.** See PUBLIC COMPANY, 5.

\* 1051 \* **LEGACY.** See WILL.

**LIMITATIONS, STATUTE OF.**

More than twenty years after a mortgagee had entered into possession, the mortgagor's solicitor wrote to the mortgagee requesting to know when he could see the mortgagee upon the subject of the mortgage. The mortgagee replied by a letter, saying, "I do not see the use of a meeting unless some one is ready with the money to pay me off:" *Held*, that this letter was a sufficient acknowledgment in writing to exclude the application of the Statute of Limitations, although not written within twenty years after the mortgagee had entered into possession. — *Stansfield v. Hobson*, 620.

**LUNACY.**

On the petition of the lunatic's father, tenant for life of large landed estates, the Lord Chancellor declined to make an order under the Act 16 & 17 Vict. c. 70, charging the estate of the lunatic tenant in tail in remainder with a sum found by the Master to be proper for the lunatic's maintenance, there being no special circumstances nor any evidence that the state of the petitioner's family was such as to make the charge just or reasonable. — *In re Pugh*, 416.

**MANOR.** See COPYHOLD, 3.

**MARRIAGE SETTLEMENT.** See DEED, 3.

**MEMORIAL.** See ANNUITY, 2.

MEMBER OF PARLIAMENT. See **BANKRUPTCY**, 2.

MINES. See **BANKRUPTCY**, 1.

**MORTGAGE.**

1. Real estate was settled on A. for life, remainder to his wife for life, remainder to the heirs of the body of the wife, remainder to the right heirs of A.; A. and his wife barred the wife's estate tail; and by that and other deeds it was settled to such uses as A. should appoint; A. appointed by a deed of July, 1817, to such uses as he and his wife should jointly appoint, and in default to himself for life, remainder to his wife for life, remainder to his son in fee. A. and his wife made several mortgages, all except one limiting the equity of redemption upon or consistently with the uses of the deed of 1817. In 1832 they made, under the power in the deed of 1817, another mortgage, which limited the equity of redemption to A. and his wife, "their heirs or assigns, or to such other persons, &c., as they should direct;" and by a deed of even date, certain terms were assigned to attend the inheritance according to the uses of the mortgage-deed of even date. \* The wife \* 1052 having died, the husband, claiming to be seised in fee, sold. On a bill filed against the purchaser by parties claiming under the son to redeem: *Held*, that the proviso for redemption in the deed of 1832 was not intended to vary the limitation of the equity of redemption, and did not defeat the limitation of the fee in the deed of 1817. — *Whitbread v. Smith*, 727.
2. Husband and wife joined in creating two mortgages on the life-interest of the wife in freehold and copyhold estates, the first mortgagee having a charge on both freeholds and copyholds, and the second on the freeholds only: *Held*, that as against the wife surviving, the second mortgagee was entitled to require that the first mortgagee should be satisfied out of the copyholds so far as they would extend. — *Tidd v. Lister*, 857.
3. A mortgagor and a mortgagee with a power of sale joined in demising the mortgaged hereditaments upon trust at the request of the mortgagee during the continuance of the security, and at the request of the mortgagor, after the satisfaction of the mortgage, to grant leases of the premises in such manner as the person making such request should appoint, and to permit the mortgagor to receive the rents until default was made in payment of the mortgage money or interest, and upon trust after default to receive the rents and apply the same in keeping down the interest upon the mortgage. These trusts were not declared to be subject to the power of sale in the mortgage: *Held*, that they were so in effect, and that the trustee was bound without the concurrence of the mortgagor to join in conveying the hereditaments to a purchaser from the mortgagee under the power of sale. — *King v. Heenan*, 890.

See also **BUILDING SOCIETY. TENANT FOR LIFE.**

**MORTMAIN.**

The Incorporated Society for promoting the Enlargement, Building, and Repairing of Churches and Chapels, one of the objects of which is, by its act of incorporation, defined to be to grant funds towards enlarging or building churches and chapels, has no power to purchase land, and

therefore a bequest of pure personalty to this society is not within the Mortmain Act. — *The Church Building Society v. Barlow*, 120.

**MUNICIPAL CORPORATIONS ACT.**

The jurisdiction conferred under the 71st section of the Municipal Corporations Act is not limited to the Lord Chancellor, but may be exercised by a Vice-Chancellor. — *In re Northampton Charities*, 179.

**NUDUM PACTUM.** See **BANKRUPTCY**, 9.

\* 1052 \* **NUISANCE.**

The disturbance of the pavement in a town by an unincorporated gas company, for the purpose of laying down gas-pipes, *held*, by the Lord Chancellor and Lord Justice TURNER (*dissentiente* Lord Justice KNIGHT BRUCE), not to be such a nuisance as to be a sufficient ground for an injunction, either upon a bill or upon an information.

Principles upon which the Court proceeds in restraining nuisances with regard to their extent and frequency.

Laches may be a defence to an application for an injunction by way of information as well as upon a bill. Effect of a protest in negating laches.

Although the motives with which a suit is instituted are not generally to be regarded, they are not wholly immaterial when the complaint is of an alleged public injury.

The views of the majority of the inhabitants of a town, and of their governing body, are not without weight on such questions as the above.

It is not enough to show a nuisance to constitute a case for an injunction; but if it is a continuing nuisance the Court will not refuse an injunction because the actual damage arising from it is slight. — *Attorney-General v. The Sheffield Gas Consumers' Company*, 304.

**PARTITION.** See **PRACTICE**, 11.

**PARTNER.** See **WINDING-UP ACTS**, 5.

**PARTNER AS TO GENERAL AND LIMITED LIABILITY.** See **WINDING-UP ACTS**, 6.

**PARTNERSHIP BOOKS.** See **PRACTICE**, 10.

**PART PERFORMANCE.** See **FRAUDS, STATUTE OF.**

**PERSONAL ESTATE, EXEMPTION OF.** See **ASSETS, ADMINISTRATION OF.**

**PLEADING.** See **PRACTICE**, 1.

**POWER.**

Whether, where the Court would aid the defective execution of a power against an owner in fee in possession, it would also do so against a remainder-man; and whether, where the assistance of the Court was not requisite to enable the purchaser to obtain the benefit of his contract, the Court would aid the defective execution of a power, at the instance of a party deriving benefit from such execution against those whose rights the exercise of the power would defeat. *Quare*, by \* the Lord Chancellor. *Morgan v. Milman*, 24.

See also **WILL**, 13.

## PRACTICE.

1. *Semble*, that in a foreclosure suit, it is not competent for the defendant to impeach the mortgage on the ground of fraud without instituting a cross suit. — *Eddleston v. Collins*, 1.
  2. On an appeal from the whole of an order made on a claim, the plaintiff is entitled to begin. — *Neathway v. Reed*, 18.
  3. The certificate of a deed as registered in a registry office in one of the colonies by the registrar, who was not "a person lawfully authorized to administer oaths," is not, *per se*, evidence of the fact of such registration under the 22d section of the Act 15 & 16 Vict. c. 86, but the signature of the registrar requires verification. — *Baillie v. Jackson*, 38.
  4. Affidavits taken in the colonies previously to the passing of the Act 15 & 16 Vict. c. 86, in the presence of a person lawfully authorized to administer oaths, are receivable in this country under the 22d section of that Act, without verification of the signature of the person before whom they have been taken. — *Bateman v. Cook*, 39.
  5. A mother of an infant under seven years of age, not living apart from the father, but prevented by him from having access to the infant, was permitted, on application being made *ex parte* for that purpose, to present a petition under 2 & 3 Vict. c. 54, in *forma pauperis*, without a next friend, and without payment of the stamp of 1l. required by the orders of the Court. And held that, upon such an *ex parte* application, it was no improper suppression to forbear stating that the intended petitioner had relatives in good circumstances, it not being shown that any of them would have been willing to act as her next friend. — *In re Hakiwell*, 116.
  6. Where a foreclosure suit was instituted before the 15 & 16 Vict. c. 86, and stood over in order that the *cestuis que trustent* under the mortgagor's will might be made parties: Held, that, after the Act came into operation, the suit might proceed in their absence, the trustees and executors of the mortgagor representing them sufficiently. — *Salé v. Kitson*, 119.
  7. Where more than two folios in one place are introduced by amendment into a bill, it must be reprinted. — *Stone v. Davies*, 240.
  8. The Court will not call for the assistance of a Judge of a Court of Common Law unless it entertains a reasonable doubt. — *Heward v. Wheatley*, 628.
  9. Oaths may be taken by the commissioners appointed to administer oaths in Chancery under the Act 16 & 17 Vict. c. 78, not only at their respective places of business, but anywhere within the limits of their jurisdiction. — *In re Record and Writ Clerks*, 723.
  10. The meaning of the Act 15 & 16 \* Vict. c. 86, § 54, is, that \* 1055 where vouchers have been lost, or the accounts cannot be taken in the ordinary way, the Court may give special directions. But such directions will not be given unless it appears that the ordinary evidence cannot be had or merely to save expense.
- Semble*, that by the ordinary rules of the Court, partnership books are admissible in evidence for and against all the partners and their estates.

*Semble*, that the 15 & 16 Vict. c. 86, § 54, does not operate retrospectively. — *Lodge v. Prichard*, 906.

11. The plaintiff in a partition suit was entitled to six-sevenths of the estate, and had the title-deeds: *Held*, that the proper form of decree as to the documents of title was for the delivery to the defendant of such of them as related exclusively to the land which should be allotted to him, and for the retainer by the plaintiff of the rest, he undertaking to abide by any order which the Court might make as to the same, with liberty for either party to apply. — *Jones v. Robinson*, 910.
12. The Master of the Rolls or a Vice-Chancellor has jurisdiction under the 15 & 16 Vict. c. 86, § 45, to make an order in chambers upon summons to administer the effects bequeathed by a married woman under a power contained in a deed. — *Sewell v. Ashley*, 933.

See also *FEME COVERT*.

#### PUBLIC COMPANY.

1. A broad gauge railway company were shareholders in a mixed gauge railway company, who, by their Act, were bound to construct their line throughout on the broad gauge, and as to part on the narrow gauge also. In March, 1852, they filed a bill stating that the mixed gauge railway company were about to construct the line throughout on the narrow gauge, although their funds were insufficient to enable them to do so, and also to comply with their Act as to laying down the broad gauge. The bill sought an injunction to restrain the opening of any part of the narrow gauge line, and the further construction upon that gauge until the broad gauge was complete. In April, 1852, the injunction was refused. From that time contests were carried on in Parliament between the two companies, ending in the rejection of certain bills solicited by the mixed gauge company. From August, 1852, to January, 1853, correspondence was carried on between them as to traffic arrangements. In January, 1853, the broad gauge company filed a new bill, and sought an injunction to restrain the opening by the mixed gauge railway of any portion of the line upon the narrow gauge before the broad gauge was completed. In the same month they moved for an injunction in the new suit, and also appealed from the refusal of the injunction in April, 1852:

\* 1056 \* *Held*, that both motions were too late.

Principles on which the Court acts in refusing applications, either original or by way of appeal, on the ground of laches. Effect of objection in excluding laches. — *The Great Western Railway Company v. The Oxford, Worcester, and Wolverhampton Railway Company*, 341.

2. An allottee of shares in a completely registered joint-stock company, but who has not executed the deed of settlement of the company, cannot, under the provisions of the 26th section of the Joint-stock Companies Registration Act (7 & 8 Vict. c. 110), enter into a contract for the sale of his shares.
- W. E. was the allottee of shares in a completely registered joint-stock company, but had not executed the deed of settlement; his brother, T. E., acting under the authority of a power of attorney, desired Messrs. N., stock-brokers, to sell these shares, and they entered into contracts with

- purchasers accordingly; before the transfers were registered, W. E. became bankrupt, and the brokers were obliged at their own cost to complete the contracts with the purchasers: *Held*, dismissing a petition by the brokers claiming to have the bankrupt's shares transferred to them, that under the terms of the 26th section of the Act 7 & 8 Vict. c. 110, the contracts were null and void, and that the assignees of the bankrupt were entitled to the shares as part of his estate and effects. — *Ex parte Neilson*, 556.
8. A railway company contracted with another for the use of the line of the latter for a term, at graduated tolls, according to the tonnage carried, which were to be a charge on the tolls and dues of the former company. The former company had no express parliamentary power thus to charge their tolls: *Held*, that the charge was of too doubtful legality to be enforced by an injunction to restrain the former company from paying a dividend to its shareholders until the sums due upon the agreement were provided for, no case being made out showing a probability of there being no fund forthcoming to answer the demand at the hearing. — *The South Yorkshire Railway and River Don Company v. The Great Northern Railway Company*, 576.
4. The deed of settlement of a joint-stock banking company defined the terms "shareholder" and "member" as meaning the owner of a share or interest in the capital and joint stock of the company. It provided that no benefit of survivorship should arise among the shareholders, but that the shares should be transmissible to personal representatives. But there were also provisions that no executor as such should be a member of the company, but might elect to sell his testator's shares or constitute himself a member in the manner therein mentioned, and that the directors \* might forfeit the shares if the executor \* 1057 did not constitute himself a member. The deed provided for the payment of calls by the "shareholders." A transferee of shares, who, by his purchase deed, had covenanted to perform the stipulations of the deed of settlement, died, and his executor took no step to become a member of the company: *Held*, that the company were entitled to prove in a suit to administer his estate as creditors in respect of a call made after the testator's death. — *Heward v. Wheatley*, 628.
5. Specific performance of a contract by a railway company to purchase an interest in land enforced at the suit of the vendor as falling within the Statute of Frauds, in a case where the contract arose out of a notice to treat given by the company, and where the proof of the writing was found in documents which had their origin in an intention to carry out the purchase under the provisions of the company's special Act and the Lands Clauses Consolidation Act, 1845.
- To what extent the Court will interfere to compel the specific performance of contracts for the purchase of land made exclusively under the provisions of Acts of Parliament containing special provisions for that purpose, *quære*.
- A railway company is not entitled to take possession of land under the provisions of the Lands Clauses Consolidation Act, 1845, until it has settled,

not only with the persons in possession of the land, but also with all persons having any interest, *semble*. — *Inge v. The Birmingham, Wolverhampton, and Stour Valley Railway Company*, 658.

6. A railway company agreed with contractors that the contractors should work the line and keep the engines and rolling plant in repair at a specified remuneration, and that the contract should be in force for seven years, but with a proviso for its determination if the contractors did not, within forty-eight hours after notice given by the company, obey the instructions contained in such notice: *Held*, that the agreement was not of such a kind as to be enforceable by injunction restraining the company from determining the contract and resuming the possession of their line for non-compliance with impracticable requisitions.

*Quære*, whether such an agreement is consistent with public policy.

Observations on the application of the principle of specific performance to contracts respecting personal services. — *Johnson v. The Shrewsbury and Birmingham Railway Company*, 914.

See also WINDING-UP ACTS, 2.

PUBLIC INJURY. See NUISANCE.

PUBLIC POLICY. See PUBLIC COMPANY, 6. DEED, 5.

\* 1058 \* RAILWAY COMPANY. See PUBLIC COMPANY.

RECEIVER. See FEME COVERT.

REMOTENESS. See WILL, 7, 12.

RENTS AND PROFITS, ACCOUNT OF. See COPYHOLD, 3.

SEPARATION, PROVISIO FOR. See DEED, 5.

SERVANT. See BANKRUPTCY, 1.

SHARES, SALE OF. See PUBLIC COMPANY, 2.

SOLICITOR.

The omission by a client to file a certificate of taxation of a solicitor's bill within the four days prescribed by the order of October 29, 1692, does not render the order a nullity, but the client's representatives, after his death, may, notwithstanding the omission, obtain an order under the summary jurisdiction, for the delivering up of the client's papers on payment of the amount of the bill as taxed, and an action by the solicitor on the bill, after such taxation, is a contempt, and will be restrained by injunction at the instance of the representatives. — *In re Campbell*, 585.

SPECIFIC PERFORMANCE. See CONTRACT. PUBLIC COMPANY, 6. VENDOR AND PURCHASER, 1.

STATUTES.

49 Geo. 3, c. 121. See BANKRUPTCY, 4.

10 Geo. 4, c. 56. See BUILDING SOCIETY, 1.

11 Geo. 4 & 1 Will. 4, c. 70. See CHARITY, 2.

3 & 4 Will. 4, c. 98. See USURY.

5 & 6 Will. 4, c. 76. See MUNICIPAL CORPORATIONS ACT.

- 6 & 7 Will. 4, c. 19. See ECCLESIASTICAL COMMISSIONERS.
- 6 & 7 Will. 4, c. 32. See BUILDING SOCIETY, 1.
- 2 & 3 Vict. c. 27. See USURY.
- 2 & 3 Vict. c. 54. See PRACTICE, 5.
- 7 & 8 Vict. c. 110. See WINDING-UP ACTS, 6. PUBLIC COMPANY, 2.
- 8 Vict. c. 18. See PUBLIC COMPANY, 5.
- 12 & 13 Vict. c. 106. See BANKRUPTCY.
- 13 & 14 Vict. c. 60. See TRUSTEE ACT, 1850.
- 15 & 16 Vict. c. 86. See PRACTICE.
- 16 & 17 Vict. c. 70. See LUNACY.
- 16 & 17 Vict. c. 78. See PRACTICE, 9.
- STATUTES, CONSTRUCTION OF GENERALLY. See USURY.
- \* STEWARD. See COPYHOLD, 1.
- SURRENDER. See COPYHOLD.

#### TENANT FOR LIFE.

Tenant for life, with an absolute power of appointment, bound to keep down the interest on charges created by himself. — *Whitbread v. Smith*, 741.

THELLUSSON ACT. See WILL, 2.

#### TRADE-MARKS.

1. In 1847 Joseph R. & Sons obtained an injunction to restrain N. & William R. from using the trade-mark "J. R. & Sons." Soon afterwards W. R. entered into partnership with his father John R. and with a brother, and the three used the trade-mark "J. R. & Sons," with a colourable addition. Upon the plaintiff's moving, in 1853, to commit W. R., and denying notice of the breach of the injunction before July, 1852: *Held*, that they were entitled to the order, and that acquiescence, to constitute a defence to such a motion, must amount to a license to use the mark. *Held*, also, that the plaintiffs might move to commit W. R. without bringing his partners before the Court. — *Rodgers v. Nowill*, 614.
2. Where a person is selling an article in his own name, fraud must be shown to constitute a case for restraining him from so doing on the ground that the name is one in which another has long been selling a similar article.

Therefore where a father had for many years exclusively sold an article under the title of "Burgess's Essence of Anchovies," the Court would not restrain his son from selling a similar article under that name, no fraud being proved.

Delay from October to March in appealing from the refusal of a motion for an injunction, *held fatal* to the appeal. — *Burgess v. Burgess*, 896.

#### TRINITY COLLEGE, CAMBRIDGE, STATUTES OF.

The *regius* professorships of Divinity, Greek, and Hebrew were founded and endowed in the University of Cambridge by King Henry VIII., antecedently to the foundation of Trinity College, and the lands on which the endowment was charged were afterwards granted to the college, which thenceforward became bound to pay the stipends of the three



- professors. By the 41st of the statutes granted by Elizabeth to the college, it was provided that any fellow of Trinity College, on being elected to any one of the professorships, "*Socii nomen solum teneat.*" By letters-patent of Charles II., this disabling provision was annulled, so, far at least as related to the Greek and Hebrew professorships. By the Act 3 & 4 Vict. c. 113, the canonry of \* Ely was annexed to the *regius* professorship of Greek; and in 1844, her Majesty, by letters-patent and at the instance of Trinity College granted a new code of statutes to the college, which, after reciting the statutes given to the college by Elizabeth, but not adverting by name to the letters-patent of Charles II., revoked "all statutes, ordinances, and decrees made and given for the government of the college;" and among the new statutes, the 41st of Eliz. was re-enacted in the same terms. In 1853, one of the junior fellows of the college accepted the office of *regius* professor of Greek, and was subsequently elected a senior fellow: *Held*, that by the acceptance of the office of *regius* professor, he ceased to be a fellow, except in name only, and that his election as a senior fellow was void. — *Ex parte Edleston*, 742.

TRUSTEE.

1. Slaves in the West Indies were bequeathed to executors, upon trusts for a niece of the testator for her life, with remainder to her children. The executors having renounced and disclaimed, administration with the will annexed was granted to the niece, who afterwards married a minor. Before her husband had attained twenty-one, the husband and wife executed a settlement, reciting that the husband was, in right of the wife, possessed of the slaves theretofore the property of her late uncle; but not in any manner referring to the will. The settlement purported to assign the slaves to trustees, in trust to sell and invest the proceeds and pay the income for the separate use of the wife for life, without power of anticipation, with trusts, by way of remainder to the children of the marriage. Before the husband came of age, the husband and wife sold the slaves without noticing the settlement in the contract, but paid part of the purchase-money to one of the trustees of the settlement, the other trustees not concurring in or being in fact aware of the sale or payment. An amicable bill was then filed on behalf of the infant children of the marriage, to have the trusts of the settlement carried into execution, or a new settlement made in conformity with an offer of the husband to execute such settlement on receiving 3500*l.* out of the wife's fortune. This bill contained an allegation that the proceeds of the slaves had been invested in the names of the trustees. The trustees, by their answer, admitted the truth of this allegation. The husband and wife, answering separately, disputed the validity of the settlement, and refused to be bound by it; but the husband offered to execute a settlement on the terms above mentioned. The decree declared the settlement void, and directed a new settlement to be made upon the footing of the offer made by the husband. A settlement was accordingly executed, and the 3500*l.* \* paid to the husband. Afterwards

\* 1061

it was discovered that the admission in the trustees' answer was incorrect, the trustee who received the proceeds of the slaves having applied the money to his own use, and having by false statements induced his co-trustees to believe and admit upon the answer that the investment in their names and his had been made as there stated. His circumstances were such that any attempt to recover the amount at any period would have been hopeless. More than twenty years after the wife was aware of these circumstances, she instituted a suit against the co-trustees to make them personally liable for the breach of trust: *Held*, first, that the above facts, independently of the admission of the co-trustees in their answer, did not render them personally liable in respect of the proceeds of the sale of the slaves, the title of the settlors not having been such as to enable the trustees legally to possess themselves of the fund. Secondly, that in the circumstances of the case that admission did not create any such liability.

*Seemle*, that a clause restraining a married woman from anticipation, does not exempt her from the ordinary consequences of lapse of time and acquiescence.

*Seemle*, that in the circumstances above stated, the administratrix committed a breach of trust by marrying without providing for the security of the trust property.

*Seemle*, that having by her separate answer in the first suit refused to be bound by the first settlement, she could not afterwards sue the trustees for non-performance of the trusts of it.

*Seemle*, that her having concealed from them the nature of her title when she assumed to settle the funds, would of itself have been a defence to such a suit. — *Derbishire v. Home*, 80.

2. The trustee of a will, who, acting on the opinions of counsel, had distributed the whole estate according to a different view from that taken by the Court, was ordered to pay to the representatives of a child found to be entitled, the amount of the child's share and the costs of the suit. — *Boulton v. Beard*, 608.

See also CHARITY, 1.

TRUSTEE ACT, 1850. See ADVANCEMENT.

## USURY.

Advances made upon promissory notes not having more than twelve months to run, although further secured upon leaseholds by a contemporaneous agreement, held to be within the protection of the 2 & 3 Vict. c. 27, § 1.

*Held*, also, that, even if this were not so, such of the promissory notes as had not more than three months to run, were within the 3 & 4 Will. 4, c. 98, which does not mention land, and that this \* enact- \* 1062 ment was not repealed or affected by the 2 & 3 Vict. c. 27.

An affirmative statute is not repealed by a subsequent affirmative statute, unless the two cannot stand together. — *Ex parte Warrington*, 159.

**VENDOR AND PURCHASER.**

1. Conditions of sale stated that an abstract of title would be furnished within seven days from the day of sale, on the application of the purchaser for the same, and provided that all objections should be taken within eight days of such delivery or be considered as waived. The purchaser's solicitor called for the abstract two days after the sale, but owing to the estate being in mortgage, and the mortgagées being abroad, the abstract was not delivered till thirteen days after the sale. The purchaser brought an action for the deposit. The vendor filed a bill for specific performance and an injunction: *Held*, on demurrer, that the time of the delivery of the abstract was not of the essence of the contract, the importance of stipulations as to time being differently regarded in Courts of Law and Equity. — *Roberts v. Berry*, 284.
2. A mortgagee cannot effectually, in equity, without the concurrence of the mortgagor, release a vendor from whom the mortgagor purchased, from his covenant for quiet enjoyment.

Therefore, where A. conveyed to B. with a covenant for quiet enjoyment, and B. conveyed the estate to C. by way of mortgage, and on B. being evicted, A., without the concurrence of B., paid to C. a sum of money in discharge of the covenant, it was held that the transaction was not binding on B.; and A. was, at the suit of B., restrained from setting up the conveyance to C., or the accord between A. and C., as a defence to an action by B. on the covenant. — *Thornton v. Court*, 293.

See also ANNUITY, 1. MORTGAGE, 3.

**WAIVER.** See WINDING-UP ACTS, 5.

**WARD OF COURT.** See INFANT.

**WILL.**

1. A testatrix by her will gave thus, — “to my sister C. N.’s surviving children, 30*l.* each;” she then gave to C. N. thus, — “the interest of my funded property for and during her natural life, and after her decease such property to be equally divided between her surviving children:” *Held*, that though, on the construction of the word “surviving” in the first clause, the period of vesting and distribution was referable to the death of the testatrix, yet that the period of vesting \* in the last clause was to be referred to the death of C. N., and that those children only who survived C. N. were entitled. — *Neathway v. Reed*, 18.
2. W. C. devised and bequeathed all his real and personal estates to trustees, upon trust as to certain parts thereof, to pay the rents and profits to his granddaughter F. E. for life, and after her death to sell the same and divide the proceeds among her children on their respectively attaining twenty-one, with remainder to the children of his nephew C. W. C., in like manner as he had bequeathed unto them the moiety of the residue of his estate and effects; the testator then empowered his trustees to sell and convert into money the residue of his real and personal estate; and, subject to the payment of his debts and legacies, he directed them

to invest the proceeds and accumulate the income, and to divide the principal and accumulation into two equal parts, and to pay or transfer one of such parts unto and amongst the children of his granddaughter F. E., and the remaining part among the children of his nephew, C. W. C.; and the testator directed that the share of each child of F. E. and C. W. C. respectively, should be a vested interest, as to sons at twenty-one or earlier death leaving issue, and as to daughters at twenty-one or marriage; and that if any such child died without having obtained a vested interest, the share of such child should accrue to the survivors of the said children; and that if there should not be any child of C. W. C. and of F. E., or of either of them, or, being such, if all such children should die without having attained any vested interest, the trust property should be held in trust for the testator's heir and next of kin according to the natures thereof; the testator died in 1826; and in 1847, the granddaughter F. E., having never been married, and being between fifty and sixty years of age, instituted a suit for the opinion of the Court as to the disposition of the accumulation of the moiety of the residue left to her children: *Held*, that the direction for accumulation was void beyond the period of twenty-one years from the testator's death, and that the subsequent accumulations were undisposed of by the will, and went, according to the nature of the property, to the testator's heir-at-law and next of kin: *Held*, also, that a direction to accumulate residue for the benefit of an infant is not a provision for raising a portion for that child, within the meaning of the second section of the Thellusson Act.

*Held*, per L. J. TURNER, that the accruer clauses in the trusts of the residue must be construed distributively, and could only operate between members of the same family, so that, on the death of F. E. without being married, the moiety limited upon trusts for her children, would devolve upon the testator's \* heir and next of kin, and \* 1064 not upon the children of C. W. C.

*Held*, also, per L. J. TURNER, that in this view, the question as to the construction of the statute was immaterial, for that, if the statute applied, as the income could not abide the event of F. E. having or not having a child, but must be received according to the statute by the person who would be entitled, if there was no trust for accumulation, the heir-at-law and next of kin would take; and if the statute did not apply, they took under the will a vested interest in the accumulations, subject only to be divested upon an event which (having regard to the age of F. E.) was impossible; and so in either case were entitled to present payment.

The decision of Lord ST. LEONARDS, in *Barrington v. Liddell*, 2 De G., M. & G., 480, remarked upon (and approved of by the Lord Chancellor). — *Edwards v. Tuck*, 40.

8. A testator bequeathed life-interests in four distinct funds to four nieces respectively, and directed that upon the decease of any or either of them, the principal of the fund, the interest of which was to be received

by her or them, should be held in trust for "the benefit of all and every the lawful children of her or them so dying, and of the survivors or survivor of my other nieces hereinbefore named, in equal shares." One of the nieces having died, leaving two children, *held*, that her fund was divisible among these children and among the children of the three other nieces; it being proper to give some force to the word "of," and that word being referable to the word "children" as the last antecedent. — *Peacock v. Stockford*, 78.

4. A testatrix, after appointing her nephew, Robert M., her executor, bequeathed life annuities, and directed "the above bequests to fall into the hands of" her nephew, John Henry M., late of C. Hall; but if he should not marry, to be divided equally between Samuel M., John M., and Mary D., all of them late of C. Hall. The testatrix had a brother living at C. Hall, who had five children, born in the following order: Robert John M., John Henry M., Samuel Johnson M., Thomas M., and Mary M., but no nephew named John M.: *Held*, affirming decree of the Master of the Rolls (*dissentiente* L. J. KNIGHT BRUCE), that John H. M., and not Thomas M., was the person meant by "John M." — *Mostyn v. Mostyn*, 140.

5. A testator devised real estate to trustees upon trust to sell, and as to the moneys to arise by such sale, directed that they should sink into and be deemed part of the residue of his personal estate and be applied accordingly; he then bequeathed all the residue of his personal estate to the same trustees upon trust for his sons and daughters in equal proportions. One of the sons died in the testator's lifetime: *Held*, that the share of the deceased son in the produce of the \* real estate was to be deemed real estate and as undisposed of by the will, and that it went to the heir-at-law of the testator.

\* 1065

The decision of Sir J. LEACH in *Phillips v. Phillips*, 1 M. & K. 649, overruled. — *Taylor v. Taylor*, 190.

6. A testator by his will devised real estate to trustees in trust to receive the rents during the life or lives of the survivor of all the children which M. G. had or should have, and, after certain deductions, to apply them in the support of M. G. and in the maintenance and education of all her children which she should from time to time have living, in equal shares between her and them. The will then contained further trusts providing that after all the children of M. G. mentioned in the above devise, and the youngest of them attained twenty-one, the rents should be divided among the said children and the issue of any of them that should happen to die leaving issue equally and the survivors and survivor of them until the death of the longest liver of the children, and after the death of the longest liver, then to convey the estates to the eldest living grandson of M. G.: *Held*, that a trust was created for the benefit of the children of M. G., who were in a state of minority, that it included children born after the death of the testator, and was for all children who might be alive from time to time until the period when the youngest of the living children of M. G. should attain twenty-one.

*Held*, also, that the further trust substituting the issue for the parent, and the ultimate trusts to convey the estates were void for remoteness.

A decree to execute the trusts of a will does not make valid trusts which on the face of the will are bad. — *Gooch v. Gooch*, 866.

7. A testator directed his executors to pay "the sum of 500*l.* apiece to each child that may be born to either of the children of either of my brothers lawfully begotten:" *Held*, that the child of a niece born within eight months after the testator's death, was entitled to the legacy, and that the gift was not as to such child void for remoteness.

Distinction, on a question of remoteness, between the gift of a sum in gross to be distributed among a class, and the gift of distinct legacies to a number of persons. — *Storrs v. Benbow*, 390.

8. Estates H. and S. were devised to trustees upon trust for R. W. and the heirs of his body, but in case he should die under the age of twenty-one *and* without issue as to estate H. for A. W. and the heirs of her body, but in case she should die under the age of twenty-one *and* without issue upon such and the same trusts as were thereafter declared concerning estate S.; and if R. W. should die under the age of twenty-one *and* without issue as to estate S. for the testator's son and daughter-in-law for their lives, \* "and subject to the trusts \* 1066 hereinbefore thereof declared," estate S. was ultimately devised to other persons. R. W. and A. W. both attained twenty-one, but died without issue: *Held*, approving of the decision in *Doe v. Jessop*, 12 East, 288, as opposed to that in *Brownsword v. Edwards*, 2 Ves. 242, that the double contingency not having happened, there was an intestacy as to estate H., but that the ultimate devise as to estate S. took effect. — *Pearson v. Rutter*, 398.

9. A testator, after bequeathing two pecuniary legacies, bequeathed three "clear" annuities for the lives of the annuitants. He then bequeathed his residuary estate in trust to pay a clear annuity of 1000*l.* to his widow, and upon trust, after payment of the four annuities, to pay the residue of the income during the life of the widow to A. The capital of the residue, after the widow's death, was to be held as to 5000*l.* upon such trusts as the widow should appoint, and subject to her appointment the 5000*l.* was to be held in trust for B. for life, and after her death to fall into the general residue; and subject to such disposition as aforesaid, and as to the residue of the testator's estate and effects after the widow's death, and subject as to the 5000*l.* and the interest thereof as aforesaid, upon trust to pay certain legacies amounting to 18,000*l.*, with an ultimate residuary gift to E. And there was a direction that, upon the death of the several annuitants, the funds on which the annuities were secured should follow the ultimate destination of the residue: *Held*, 1. That the two first-mentioned pecuniary legacies and three annuities had priority over every other gift. 2. That the annuities were given free of legacy duty. 3. That the annuities were charged on the capital of the residue, but that A. was entitled to retain the surplus income paid to her in one year, and to receive the surplus

for another, although the income was in the subsequent years insufficient to answer the annuities. 4. That on the death of an annuitant in the lifetime of the widow, the ultimate residuary legatee did not become at once entitled to the fund set apart to answer the annuity. 5. That after the widow's death, the 5000*l.* would have no priority over the other reversionary legacies. 6. That the reversionary legatees were not entitled to have any surplus income during the widow's life set apart to secure payment of their legacies. — *Haynes v. Haynes*, 590.

10. By a will commencing thus, — "I give and bequeath the several legacies and annual sums following," a testatrix bequeathed pecuniary legacies and an annuity, and directed two sums of money to be set apart sufficient to produce two other specified annual sums, which the testatrix bequeathed to two specified persons for their respective lives. She gave to trustees the residue of her personal estate, subject to the payment of her debts, funeral and \* testamentary expenses, and the legacies and annuities which she had bequeathed or might thereafter bequeath by any codicil. And she devised her real estates to trustees for a term, upon trust to raise sufficient to pay her debts, legacies, and funeral and testamentary expenses, but directed that her personal estate should be the primary, and the term, the secondary fund for payment of her debts, legacies, and funeral and testamentary expenses: *Held*, that the separate specification of "annuities" in some parts of the will, did not prevent annuities from being comprehended under the expression "legacies" in the trusts of the term. — *Heath v. Weston*, 601.

11. A testatrix bequeathed her residuary estate upon trust for her sister for life, and after the sister's death to pay, divide, and apply the trust fund in manner following (that is to say), one-tenth to or for the use of R. H., and another one-tenth to or for the use of C. R., for their respective lives, and in case either of them should die in the lifetime of the tenant for life or afterwards *leaving lawful issue*, then the testatrix directed that the part of him or her so dying leaving lawful issue should go to and be equally divided among his or her children as they should attain twenty-one: *Held*; that a child of C. R. who survived the tenant for life, and attained twenty-one, but died in the lifetime of C. R., took a vested interest. — *Boulton v. Beard*, 608.
12. A testator gave his residuary real and personal estate upon trust for his wife for life, and after her death upon trusts for the testator's issue, with executory trusts for his sister and her issue, and in default of such issue of himself and his said sister, "or upon their total extinction under twenty-one years old," he bequeathed the said residuary estate "unto his first cousins by the mother's side, and the issue of such of them as might happen to be dead *per stirpes*, and to their heirs, executors, administrators, and assigns for ever as tenants in common, and not as joint tenants:" *Held*, 1. That the gift to the cousins was not too remote; 2. That it was not a gift to a class to be ascertained at a future period, but that the first cousins *ex parte maternâ* living at the testator's

death took vested interests liable to be divested to the extent required to let in other first cousins born before the period of distribution. 3. That the shares of first cousins who died before the period of distribution leaving no issue were not divested, but went to their real and personal representatives. 4. That the share of a first cousin who died before the period of distribution leaving children went to those children. — *Baldwin v. Rogers*, 649.

13. A testator, by his will, gave "my landed estates in W., of whatever description, with their appurtenances, and all allotments of common now inclosed or hereafter to be granted, to my daughters J., M., and \* S., to be jointly and equally enjoyed or divided in the \* 1068 case of the marriage of any of them; and they or the survivor, in case of death, are by this my will fully authorized to dispose of the same by will or assignment, as they shall think proper, giving preference to those of my name and relations, according to behaviour:" and he gave them also all his personal property, "to be by them equally divided and shared among them," and he recommended them to live together. The three daughters died unmarried. M. and J. survived S., and executed wills respectively devising all their real estate to each other for life, but with different remainders over. J. survived M. After the death of J., the plaintiffs claimed a moiety of the real estates under the will of M. The defendant claimed the entirety under the will of J. *Held*, that though the power of disposition by deed might have been exercised by J., M., and S., or by J. and M. in their lifetime, yet that J., as the survivor, had alone the power of disposing of the estates by will, and that the defendant, as her devisee, was entitled to the entirety.

*Semble*, that the will of the testator created a joint tenancy in fee. — *Cookson v. Bingham*, 668.

14. The Ecclesiastical Court granted probate of a will of personalty with cross lines drawn in ink over the bequests of certain legacies: *Held*, on a claim raised by the parties interested in these legacies, that the will must be taken to have been executed after the cross lines were drawn, and that the only question was, what was the meaning of the testator, and that this was that the legacies were not to stand part of the will. — *Gann v. Gregory*, 777.

15. A mere legal devisee may file a bill against the heir-at-law of the testator for the purpose of having the will established against him, though no trusts are declared by the will, and though it is not necessary to administer the estate under the direction or decree of a Court of Equity. — *Boyle v. Rossborough*, 817.

16. A testator, by a will made after the Wills Act came into operation, devised to trustees for 500 years all his freehold and copyhold hereditaments in the county of D. which had or might thereafter come into his possession "by inheritance" from his father, whose heir he was. The testator's property in the county of D., when he made his will, consisted of one estate devised to him by his father before the Wills Act came



into operation, and of another which had been conveyed to him by his father by a deed of gift, and into the possession of which he had entered in his father's lifetime. *Held*, that the latter estate was not subject to the trusts of the term, though without it they could not be fully performed as regarded the amounts directed to be raised under them. — *Wilkinson v. Bewicke*, 937.

- \* 1069 17. A testator gave his residuary estate upon trust to pay to A. an \* annuity during her life, and to accumulate the surplus income till the expiration of six months after A.'s death, and then to divide the residue and accumulations into as many shares as there should be children "living" of A. and of B. who should have lived to attain twenty-one, or in case of any of them being dead under that age who should have left issue, to pay and apply one share to each of the children of A. and B. that should have lived to attain twenty-one and to their respective executors, administrators, and assigns, and one share to the issue of each child who should have died under that age leaving lawful issue. *Held*, that the word "living" was not referable to the period of distribution, but to that of the testator's death, so that each child on attaining twenty-one took a vested interest absolutely. — *Kidd v. North*, 947.

18. A bequest of an annuity to an unmarried woman (if living and unmarried at the death of a prior annuitant) for the term of her natural life, if she should so long remain unmarried: *Held* to be a limitation, and not a bequest upon a condition subsequent, and therefore determinable upon marriage. — *Heath v. Lewis*, 954.

19. A testatrix bequeathed all her property to trustees upon trust to secure thereout a life annuity to her niece to be paid to her half-yearly for her own use independently of all control, and directed that after the niece's death the principal should revert to her father and his children, but that during her life the placements so far as regarded the niece's income should be well secured, and the funds not moved without the niece's consent as well as that of her trustees, and she directed that the surplus of the income after payment of the annuity should go to the niece's father for his use and that of his other children, but the whole was to be at the disposal of the niece under the advice of the trustees to insure the payment of certain pecuniary legacies. The assets were insufficient to pay the annuity and all the legacies in full. *Held*, that the annuity was payable out of the capital. — *Croly v. Weld*, 993.

See also COPYHOLD, 3.

#### WINDING-UP ACTS.

1. The court has jurisdiction to direct an official manager of a joint-stock company appointed under the Winding-up Acts who, in that character, has unsuccessfully instituted a suit, to pay the costs of it personally.

An order that "W. T., official manager of the said company," do pay costs, is an order rendering him personally liable to make the payment.

*Semble*, that the 53d section of the Winding-up Act of 1848, authorizing the prosecution of suits by the official manager, does not extend to a suit

commenced by one shareholder on behalf of himself and the others, except such as are \* defendants. — *The Grand Trunk Railway Company v. Brodie*, 146. \* 1070

2. By the deed of settlement of a joint-stock company formed for the purpose of building a corn exchange, it was provided that the affairs of the company should be under the entire control of the directors, who should have power to create new shares and to borrow money under certain prescribed conditions: the deed also provided that the directors might make calls on the shareholders as they should think fit, but not beyond the amount for the time being remaining unpaid of their respective shares. The capital of the company having been all called up and expended, the directors advanced out of their private funds and borrowed from other quarters (but not in conformity with the provisions of the deed) a sum sufficient to defray the extra expenditure which had been incurred. *Held*, on the winding-up of the company, that, as between the directors and the shareholders, the latter were not liable to contribute to such extra expenditure.

Part of the moneys advanced had been lent by a bank, one of the partners in which was a shareholder in the company. *Held*, that, as between the company and the bank, the latter must be deemed to have had notice of the restricted liability of each shareholder, and consequently had no claim against the company for the advance. — *In re Worcester Corn Exchange Company*, 180.

3. At some of the meetings of the managing committee of a provisionally registered railway company, at which A., one of the committee, was present, it was resolved that certain proceedings should be advertised. At another meeting, attended by four of the body, but not by A., it was resolved that a circular should be sent to the members of the provisional committee, which included the members of the managing committee, stating that, on payment of 160*l.* each, they should be released from all liability. A. and others paid the amount, and A. never attended any subsequent meeting. Meetings of the managing committee were afterwards held, at which some of these payments were referred to, and the terms of the circular were recognized and acted upon. The company was wound up, under the Winding-up Acts, and it appeared that one of the provisional committee had been compelled, by proceedings at law, to pay the bill of the advertising agent: *Held*, that A. was *prima facie* liable for some part of the demand, and was not exonerated by his payment of 160*l.* and the subsequent conduct of his co-committeemen, but had been properly placed on the list of contributories. — *Pearson's Executors' Case*, 241.

4. An allottee of shares in a projected railway company paid the deposit on them, and executed the subscribers' agreement; he did so on the faith of a letter, circulated by the provisional directors, undertaking \* to return the whole deposit in the event of the Act not \* 1071 being obtained: the subscribers' agreement was in the usual form, and contained a covenant by the shareholders to indemnify the

provisional directors, whether the Act should or should not be obtained. The directors failed to obtain the Act of Parliament, and the company was wound up under an order obtained for that purpose: *Held*, that, as between the directors and the allottees, the former were primarily liable for all costs connected with the winding up of the concern; and a call made in respect of such costs was discharged accordingly, there being nothing to show that the directors were unable to pay the amount required by the official manager. — *Mowatt and Elliott's Case*, 254.

5. A clause of a partnership deed, however precise, may be waived by the conduct of all the partners, but a waiver of the stipulations of a company's deed by the directors is not sufficient, unless it is shown that the body at large made the directors their agents for that purpose.

Where, therefore, a shareholder bequeathed his shares, and the executor assented to the bequest, and the secretary placed the name of the legatee and her husband opposite the shares in the books of the company, but the provisions of the deed of settlement had not been complied with as to the transfer of the shares, nor was it shown that all the shareholders of the company had concurred in dispensing with such compliance: *Held*, that the executor was the proper person to be placed on the list of contributories under the Winding-up Acts. — *Keene's Executors' Case*, 272.

6. A company completely registered under the provisions of the Joint-stock Companies Registration Act (7 & 8 Vict. c. 110) was ordered to be wound up: various proceedings were taken to get in the assets, but without success: costs were incurred, and at last it became necessary to provide the official manager with funds to pay these costs and to prosecute his duties generally: for this purpose a call was made on all persons without distinction whose names were on the list of contributories, some having paid and some having not paid the original deposits on their shares: *Held*, on an application to discharge the call by one of the persons who had paid his original deposit, that the call was properly made.

*Gay's Case*, 1 De G., M. & G. 347, observed on.

The Court would not be inclined to interfere with a call properly made merely on the ground that the amount had been estimated at too large a sum. *Semble*.

On a question raised that by one of the clauses of the deed of settlement of the company the liability of the shareholders to third parties was limited to the amount of their shares: *Held*, that such could not be the real meaning of the clause, \* having regard to the powers conferred by the other clauses of the deed for the conduct of the business of the company.

\* 1072

Supposing, however, that the meaning of the clause had been to limit the liability as to third parties: *Held*, that the creditors of the company would not, by the operation of the clause and of the Joint-stock Companies Registration Act, lose their right to proceed against the shareholders beyond the amount of their shares.

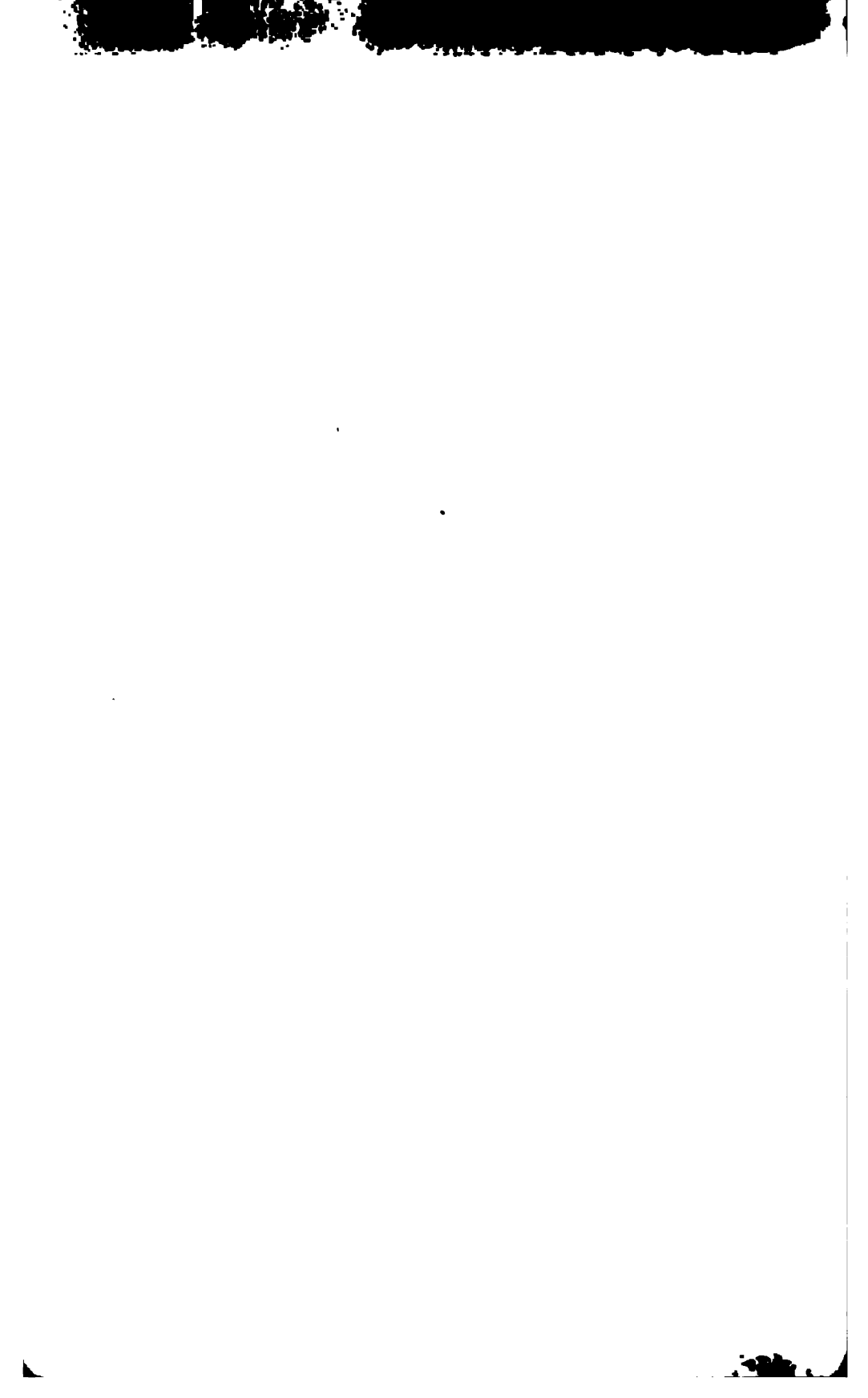
The general liability of partners to creditors is not materially affected by the provisions of the Joint-stock Companies Registration Act: the effect of the 25th and 66th sections considered.

The decisions in *Ridley v. The Plymouth Grinding and Baking Company*, 2 Exch. 711; *The Kingsbridge Flour Mill Company v. The Plymouth Grinding and Baking Company*, 2 Exch. 718, and *Smith v. The Hull Glass Company*, 8 C. B. 668, 11 C. B. 897, observed upon. — *Greenwood's Case*, 459.

[ 837 ]







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